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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ALONZO W. LAWRENCE and JAMES SIMPSON,

Petitioners,

-vs-

BAUER PUBLISHING & PRINTING LTD., a corporation, KURT CHRISTOPHER BAUER, JEFFREY LANCE BAUER and PATSY BONTEMPO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. In a libel action, to what extent does the voluntary involvement of a plaintiff in a public controversy render him a public figure?

2. In a libel action, what proof is necessary in determining actual malice for a public figure?

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The dissenting opinion of Justice Schreiber upholding the jury verdict in favor of the petitioner Simpson against all defendants except Bontempo and upholding the order for a new trial foı the petitioner Lawrence appears at App.38-67.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.Sec. 1257(3). The New Jersey Supreme Court's decision was decided on April 27, 1982 (App.1) and this petition for writ of certiorari is timely filed thereafter.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves Section One of the Fourteenth Amendment to the United States Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The two plaintiffs in this case are Alonzo W. Lawrence and James Simpson, who were respectively president and secretary-treasurer of an organization called the Rahway Taxpayers Association. The defendants are the Bauer Publishing and Printing Ltd., the publisher of a local newspaper called the Rahway News Record, its editor, publisher, and majority stockholder, Kurt Christopher Bauer, his brother, Jeffrey Lance Bauer, a minority stockholder, and Patsy Bontempo, a reporter for the newspaper. On January 9, 1975, the Rahway News Record printed in banner headlines against the top of the front page the following: "FORGERY CHARGES MAY LOOM FOR LAWRENCE, SIMPSON" (App. 67). The articles that accompanied this headline said in part as follows:

> "In separate actions city attorney Alan Karcher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Romankow was

asked to take action by city officials against leaders because of 'irregularities' in the petitions.

"The Rahway News-Record learned Mr. Romankow was empowered to handle a case against Alonzo W. Lawrence, president of the association, and James Simpson, the group's secretary-treasurer.

"The city's case would be based on charges that forgery was involved in the gathering of approximately 5,000 signatures which the two men filed with the city clerk Robert W. Schrof on December 27, the News-Record was told.

"In connection with this the men would also be charged with false swearing of oaths and affidavits, it was asserted." (App.67)

On April 17, 1975, as a result of a demand for a retraction by the plaintiffs' attorney, the Rahway News-Record published a second article on the lower lefthand corner of the first page with the following headlines, "NEWS-RECORD ASKED TO RETRACT ARTICLE ON FIREHOUSE BATTLE" (App. 106). The article that accompanied this headline said in part as follows:

"The Rahway News-Record was asked to retract statements made in the January 9 edition concerning the article headlined 'Lawrence warns mayor on libel' 'City attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson.'

"The News-Record was told prior to publication of the January 9 edition by a source in the administration that city officials were turning the petitions over to the local prosecutor, which in fact they did, to investigate allegations of forgery and false swearing of oaths.

"It should be clearly stated that in each case where the charges were made, The News-Record was careful to note it 'was told,' it 'learned' or 'it was asserted.'

.....

"The fact of the matter is that the Rahway Taxpayers Association, of which Messrs. Lawrence and Simpson are officers, announced in a paid newspaper advertisement that it was 'spearheading' a petition drive seeking to bar added appropriations for the new firehouse.

.....

"The gentlemen, thus, are in fact associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths." (App.106)

The subtle difference between the first and second article should be noted and will be discussed in more detail in the argument. In the January 9, 1975 article, the article stated specifically that Mr. Romankow, the prosecutor, was empowered to handle a forgery case against Lawrence and Simpson as well as charges of false swearing against both men. The second article, which all parties admit was not a retraction, did not state that Lawrence and Simpson were being charged with forgery and false swearing--only that they are associated with the petitions and the petitions are under investigation for allegations of forgery and false swearing. The distinction made here in the two articles is important in determining whether or not actual malice existed.

In any event, it was the publication of these two articles that led to the present law suit. While there were many issues argued in various stages of the

proceedings, the decision of the New Jersey Supreme Court in setting aside a verdict for the defendant Simpson and an order for a new trial granted by the trial court to Lawrence rested its reversal on federal questions. The majority decision found that both Lawrence and Simpson were public figures and it also found that as public figures, the standard of actual malice required in the case of Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) was not met.

The question of whether the plaintiffs were public figures was not raised by the defendants in their pleadings. Instead, the defendant raised the issue for the first time at the time of the trial by making a motion to amend their pleadings to set forth this issue. The trial court granted this application. All of the issues were then tried at the same time, including the issue of whether the plaintiffs were public figures. The defendant introduced into

evidence in support of his contention that the plaintiffs were public figures, some twenty newspapers articles published by the defendant's newspaper, all of which mentioned Lawrence and only one of which mentioned Simpson.

At the end of the trial, the trial court ruled that the question of whether the plaintiffs were public figures was a question of law to be determined by the court. The trial court then found that Lawrence was a public figure and that Simpson was a private figure. Its findings in this regard on both plaintiffs are set forth in the appendix (App.100-105). The Court then found no actual malice on the part of the defendant and dismissed Lawrence's complaint. The Court allowed the Simpson case to go to the jury, which awarded a verdict of $22,500 in favor of Simpson and against the defendant newspaper and the defendant Bauer. The jury ruled in favor of the reporter Bontempo.

However, on application made by the plaintiff the trial court reversed its decision concerning Lawrence on the ground that it had made a mistake. The trial court, in reversing its original decision stated that it believed there was sufficient evidence of actual malice to go to the jury and granted Lawrence's application for a new trial under the Gertz v. Welch, supra standard. The defendant's Leave to Appeal was granted by the Appellate Division and the Appellate Division upheld the decision of the trial court with respect to both Lawrence and Simpson (See App. 68-99). The defendants, thereafter, filed another motion with the New Jersey Supreme Court to allow the defendant to appeal, which was granted by the New Jersey Supreme Court, who reversed the decision of the trial court and the Appellate Division (App. 1- 37) on the ground that Lawrence and Simpson were both public figures and that no actual

malice was shown. There was a dissenting opinion by Justice J. Schreiber who did uphold the trial court's decision (App. 38-67). Justice Schreiber found that Lawrence should have been a public figure, that Simpson was a private figure and that there was actual malice shown sufficient to go to the jury on Lawrence's complaint.

Since the New Jersey Supreme Court's reversal was based on its interpretation of the federal law, we shall confine ourselves to the evidence that was submitted on the question of whether or not Lawrence and Simpson were public figures and the evidence concerning actual malice on the part of the defendants.

On the question of public figure, the evidence was as follows:

1. The Rahway News-Record is a small community paper with a circulation of approximately 4,800. It is the only local newspaper and the only paper which carried

the articles concerning the controversy (an out of town paper which had a small circulation in Rahway did not publish any article about the controversy). This newspaper was designated also as the official publication by the City of Rahway and as the official publication, published all the notices that the City had to publish that was required by law such as ordinances, resolutions, etc. This designation as the official newspaper brought in significant revenue to the newspaper.

2. The controversy that arose in the City of Rahway in 1974 concerned whether or not an additional $100,000 should be spent for the construction of a firehouse. The municipal council had passed an ordinance appropriating additional revenue for its construction. The Rahway Taxpayers Association spearheaded a drive to place the issue on the ballot by means of the referendum

process. This association did not take a position on whether or not the voters should approve or disapprove the amendment to the ordinance but was concerned only with the question of whether the voters should have the right to vote on the question. Under state law, N.J.S.A.40:69A-185, to place the issue on the ballot, twenty-five (25%) percent of the registered voters of Rahway needed to sign a petition requesting a referendum on the ordinance. Furthermore, under N.J.S.A.40:69A-186, there had to appear on each petition paper, the names and addresses of five voters designated as the committee of the petitioners. Simpson and Lawrence where two of the five committee of the petitioners.

3. The plaintiff Lawrence, as president of the Rahway Taxpayers Association, led the drive to place the matter on the ballot. The nineteen or twenty articles published by the Rahway News-Record

concerning the controversy mentioned Lawrence in each article. Simpson, however, was mentioned in only one article. Approximately 20 - 25 people obtained signatures on the petition sheets including Lawrence and Simpson. Lawrence obtained approximately 200 and Simpson approximately 250 names. Over 5,000 names were obtained on the petitions which exceeded the 25% requirement and Lawrence and Simpson were in a picture published by the Rahway News-Record in December, 1974 showing the petitions being delivered to the City Clerk. Lawrence and Simpson had made a practice of attending the monthly meetings of the municipal council. After the newspaper articles, Simpson withdrew from attending these meetings. At the trial of this matter none of the prospective jurors, including several who were from Rahway, had ever heard of Lawrence or Simpson or had read

about the controversy.

This summarizes the evidence that was submitted in connection with the determination of the public figure status of the plaintiffs. Based on this evidence, the trial court and the Appellate Division and the dissenting opinion of the New Jersey Supreme Court found that Lawrence was a public figure and Simpson was not. The majority opinion of the New Jersey Supreme Court found on the evidence that both Lawrence and Simpson were public figures.

With regard to the question of actual malice, the evidence produced at the trial was as follows:

1. The only source for the first article of January 9, 1975, was Joseph Hartnett, who had been appointed business administrator of the city in January, 1975. Mr. Hartnett had no official duties in connection with the filing or examination of the petitions, the State statute giving

these duties to the city clerk (N.J.S.A. 69A-188). Mr. Hartnett testified as a witness for the defendant and testified that he only told the defendant Bauer and the reporter Bontempo that the petitions were being investigated for forgery and false swearing. He stated emphatically that he never told the newspaper that Lawrence and Simpson were being investigated or charged with either false swearing or forgery. Insofar as forgery is concerned, Hartnett testified that the investigation of forgery concerned such instances as a husband signing a petition for his wife or vice versa. With regard to the false swearing charge the investigation centered on whether or not the requirement of N.J.S.A.40:69A-186 was met; namely, that there should be an affidavit attached to each circulator of the petition that he personally circulated the paper and that the signatures were made in his presence.

Bauer and Bontempo had both testified that Hartnett was a reliable source in the past.

After the defendant received the letter from the plaintiff's attorney demanding a retraction, the defendant Bauer became alarmed and consulted his attorney. His attorney, Mr. Leo Kahn, then arranged for a four-way conference call between Mr. Bauer, Mr. Kahn, the source, who was Joseph Hartnett, and Mr. Theodore Romankow, who was the local prosecutor who had been empowered to make an investigation of the petitions. The testimony concerning this conversation was uncontradicted and Hartnett made it quite clear in his testimony that in that conversation Hartnett again told Bauer that he never said that Lawrence and Simpson were under investigation for forgery or false swearing, nor were they guilty of those two crimes. He again reaffirmed that there was an investigation being made of the

petitions but not of Lawrence or Simpson. Bauer never denied that this was what Hartnett told him in this phone call. What Bauer choose to rely upon was a letter that Mr. Romankow, the prosecutor, wrote as a result of this telephone conversation. This letter, which was dated April 17, 1975 stated as follows:

> "It appears a question has arisen whether I was requested by the adminstration to investigate allegations of forgery and false swearing of oath concerning petitions seeking to bar added appropriations for the new Rahway Fire House circulated by the Rahway Taxpayers Assocation, whose leaders include Alonzo W. Lawrence and James Simpson.
>
> "Please be advised that I did conduct an investigation through the Rahway Police Department and I then requested that the matter be forwarded to the Union County Prosecutor's Office. The file, to my understanding, was forwarded."

Mr. Romankow testified as a witness for the defendant and admitted on cross-examination that he did not mean by that letter to state that Lawrence and Simpson were under

investigation and were going to be charged with forgery and false swearing. Bauer changed his tactics with the April 17th statement.

He did not retract the allegations made against Lawrence or Simpson concerning forgery and false swearing in the January 9th article even though he now knew again that Hartnett had stated that he had never told Bauer that Lawrence and Simpson were being charged or being investigated for these crimes. (It is conceded by the defendant that the April 17th article was not a retraction.) Bauer never denied that this was what Hartnett told him in that phone conversation. Instead the defendant attempted, by the April 17th article, to give the impression that the April 17th article was consistent with the January 9th article. Instead, there was a clear shift in emphasis by Bauer in the April 17th article because

now Bauer was only stating that investigation was being made of only petitions circulated by the Rahway Taxpayers Association, "whose leaders include Alonzo W. Lawrence and James Simpson." Bauer now knew without a doubt that Lawrence and Simpson were not investigated or charged with these crimes but he chose not to retract but instead hoped that a reader would overlook the clear error that he had made in the January 9th article.

It was on this evidence that the trial court reconsidered its dismissal of Lawrence's complaint. The trial court frankly admitted it had overlooked the significance of the evidence that lead to the April 17th article. The Appellate Division agreed with the trial court but the New Jersey Supreme Court found that it did not show actual malice on the part of the defendant.

ARGUMENT

POINT I. THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIFICATION IN ORDER TO RESOLVE THE ISSUE OF THE EXTENT TO WHICH VOLUNTARY INVOLVEMENT OF A PERSON IN A PUBLIC CONTROVERSY RENDERS HIM A PUBLIC FIGURE.

In 1974, the United States Supreme Court in Gertz, v. Welch, supra, offered its general definition of "public figures":

> "For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence their deemed public figures for all purposes, more commonly, those classes public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Since this decision, the United States Supreme Court has not had an occasion to consider to what extent the voluntary involvement of a person in a public controversy renders him a public figure. While the Court, since its decision in the Gertz v. Welch, supra has given considera-

tion to what constitutes a public figure, these cases have dealt only with the person's involuntary involvement in a public controversy.

Thus, in Wolston v. Readers Digest Ass'n, Inc., 443 U. S.157, 61 L.Ed.2d 450 (1979), the Court considered a situation where the trial court had found that a plaintiff had fallen into the second category of public figure, one who has thrust himself to the forefront of a particular controversy in order to influence the resolution of the issue involved. In this case, the lower court found that the petitioner was connected with Soviet espionage in the 1940s and 1950s. The United States Supreme Court, however, reversed the decision of the lower court stating that the plaintiff was not dragged willingly into the controversy and, therefore, did not "voluntarily thrust" or inject himself into the forefront of the

public controvery surrounding the investigation of Soviet Espionage in the United States. In reversing the lower court's decision the Supreme Court made the following statement:

> "Petitioner's failure to appear before the grand jury and citation for contempt no doubt were "newsworthy," but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 44 (1971), which concluded that the New York Times standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this position in Gertz and in Firestone, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times. See Time, Inc. v. Firestone, 424 U.S., at 454."

In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the

United States Supreme Court reversed a decision of the District Court which held that the petitioner was a public figure because the petitioner had successfully obtained federal funds which were reported in a newspaper and because the petitioner had access to the media to respond to the defendant-senator's giving the petitioner "A Golden Fleece Award". In reversing the United States Supreme Court stated that, "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." The Court held not only did the petitioner not become involved in any such controversy but that he had not "assumed any role of public prominence in the broad question of concern about expenditures". The Supreme Court further held:

> "Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden

> Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure."

The present case for the first time explores the voluntary involvement of an individual in a public controversy and the extent to which his involvement renders that person a public figure. In this case, there are two plaintiffs with markedly different degrees of involvement in the controversy. The differences are set forth in the trial court's opinion which we have attached (App.100-105) where the court found that Lawrence was a public figure and Simpson a private figure. This is explored also in both the majority opinion of the New Jersey Supreme Court which ruled that both petitioners were public figures (App. 24-29) and the dissenting opinion which upheld the trial court's determination that Lawrence was a public figure and Simpson a private figure (App. 42-53).

The standard set forth in Gertz v. Welch, supra in determining the status of a public figure was whether the individual had thrust himself to the forefront of the controversy in order to influence the resolution of the issue involved. In arriving at different decisions, two factors were considered: (1) the action of each individual plaintiff; and (2) the defendant newspaper's reporting of the activity of the plaintiff.

The majority opinion cited both factors in deciding that both Lawrence and Simpson were public figures (App. 24-29).

With regard to Lawrence, the majority opinion found that he was the founder of the Rahway Taxpayers Association, he regularly attended council meetings and at one public meeting he was one of only five (5) people permitted by the City Council to speak on this issue on behalf of the public. It further found that Lawrence

initiated the petition drive, he was one of five persons whose name appeared on each petition sheet and that he collected at least 200 signatures. With regard to how the defendant newspaper handled Lawrence, the court found that he provided press releases to the newspaper and that his name had been mentioned in approximately 20 published articles in a few weeks prior to the publication of the January 9th article. It held that this was sufficient to justify the finding that Lawrence was a public figure (App. 24-27).

With regard to Simpson, the court found that he was secretary/treasurer of the Rahway Taxpayers Association and also one of the five member committee of petitioners whose name appeared on each petition as required by law. Simpson collected approximately 250 out of the over 5,000 signatures. The only involvement he had with the media was that he had

his picture in the paper in December, 1974 when the petitions were delivered to the City Clerk. On this basis the Court found that Simpson was a public figure (App. 27-29).

The dissenting opinion of New Jersey Supreme Court put Simpson's involvement in the proper focus (App. 49-52). It found that Simpson had written two (2) letters to the newspaper concerning the controversy and the second letter was in reply to a critic of the first letter he wrote. Of the thirteen (13) articles in the newspaper concerning the controversy, Simpson was only mentioned in one and this was an article in which Simpson was in a group picture delivering the petitions to the City Clerk. It found that he had obtained between 250 and 275 signatures on the petitions out of approximately 5,000 and that he was one of twenty who had done the same. The dissenting opinion found that

a review of the limited involvement of Simpson did not make Simpson a public figure. He did not, in other words, thrust himself "to the forefront of the controversy." The court found that Simpson did not qualify for a public figure by virtue of the requirements of the Gertz v. Welch, supra that the individual became a public figure because of the controversy and because he did not achieve special prominence in the resolution of the issue (App. 43-44). Justice Schreiber made the following conclusion:

> "One could reasonbly conclude, as did the trial court, that Simpson had not risen to that special prominence by virtue of his activities on the fire-house controversy. He had not sought to draw attention to himself to influence the public. He was part of a team of citizens who attempted to have the public vote on the issues. Though his role may have been somewhat more noticeable than others, he had not attained a special prominence because of the local publicity prior to the defamatory publications. The

trial court's comments are worthy of repetition:

> He was not in the vortex of this fight. He did not get the newspaper publicity. He acted more or less as a private citizen in attending meetings, making an occasional dispute. There's a dispute in the number of speeches he made. He talked ... occasionally at least and I do not think he meets the standards. So the Court will hold that Mr. Simpson, for the purpose of this litigation, is not a public figure."

So that the issue in this case is squarely met by the majority opinion and the dissenting opinion, namely, to what extent does a voluntary involvement of a person in a public controversy render him a public figure? It is submitted that the majority opinion is an improper application of the standards required by Gertz v. Welch, supra to determine whether a petitioner is a public or private figure. Simpson's name appeared in only one newspaper article,

he obtained signatures on petitions totaling less than five (5%) percent of the total signatures obtained, and the fact that he was listed on each petition as a member of the committee of petitioners was only because it was a statutory requirement. It is difficult to believe that he has thrust himself "to the forefront of the controversy".

It should be realized that this case is unique because it was during the trial that the defendants submitted its proof concerning the question of the public figure status of both petitioners. The sole proof offered by the defendant was twenty newspaper articles from the defendant's newspaper, thirteen of which dealt with the firehouse controversy. The defendant introduced no other witness and relied solely upon the newspaper articles that the defendant published. There was no testimcny by any of the defendants or their witnesses that Simpson was in fact a leader of the contro-

versy or that he had achieved any special prominence with regard to the controversy.

The danger of the majority opinion of the New Jersey Supreme Court if allowed to stand on the issue of public figure was pointed out in the dissenting opinion of Justice Schreiber where he stated:

> "Two highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years. This is the result of their sincere attempt to participate in local government." ... (App. 30)
>
> . . . .
>
> "A freely expansive notion of a public figure in the context of this case defeats the major underlying purpose of the New York Times principle. It will throttle rather than foster public debate and criticism. The chilling effect on the individual's right of free speech is real. This case illustrates what may occur. After the libelous newspaper article appeared, Simpson stopped attending and speaking out at municipal council meetings. Lawrence, too, had second thoughts about his activity, though he

decided to continue. Citizen participation in local governmental affairs is to be encouraged, not discouraged. Broadly construing "public figures" to embrace townspeople whose only notoriety relates to debate over a local governmental controversy of the type exemplified in this case is counterproductive." (App. 54-55)

The dissenting opinion went on to quate Professor Eldredge in his treaties of The Law of Defamation (1978) as follows: (App. 55)

"'Suppose the private citizen criticizes the Board of Magistrates and charges corruption in the disposition of gambling cases in the city. If there can be unleashed against him a stream of false defamation under the protection of New York Times, his voice will soon be silenced, or made ineffective. And seeing this result, who will dare to speak out again in the same vein? Unbridled defamation concerning matters of public concern was a tool that Nazis used in pre-World War II Germany to destory important men and render unless what they said, the men whose messages desperately needed to be heeded.'"

In any event, the issue of the extent to which a person's voluntary involvement

in a public controversy makes him a public figure is squarely presented in this case. This is an important question that affects citizens in every municipality in the United States and it is an issue that should be considered by the United States Supreme Court so that the proper standard may be established.

POINT II. THE SUPREME COURT SHOULD GRANT CERTIFICATION ON THE ISSUE OF THE EXTENT OF PROOF NECESSARY TO RAISE A JURY QUESTION ON ACTUAL MALICE FOR A PUBLIC FIGURE IN A LIBEL CASE.

The second question for which petitioners are seeking certification assumes that either Lawrence and Simpson or both are public figures. What constitutes actual malice bothered the trial court. The trial court originally found, after declaring Lawrence a public figure, that no actual malice was shown. However, after a motion was made by Lawrence, the court reversed itself and granted Lawrence a new trial for the reason that, as stated by the trial court, "I think there is evidence that Mr. Bauer actually knew the charges were not true when the articles were printed."

The New Jersey Supreme Court, ruling that there was no actual malice shown, did

not analyze the evidence, but merely stated the following (App. 32-33).

> "Here, defendants honestly believed that the concededly misleading statements published in the two articles were true. Their misconcepts arose primarily from their conversations with Hartnett in which he told them that the petitions were under investigation for possible evidence of false swearing and forgery. Having been informed by Hartnett that petitions witnessed by both Lawrence and Simpson were among those being examined, defendants thought it was a reasonably certain implication that any such investigation would center around the activities of Lawrence and Simpson, who were known by the newspaper to be the key figures in circulating and filing the petitions."

The court went on to say that the post trial argument of Lawrence was merely that the information that the Defendant received from the source, Hartnett, and City Prosecutor Romankow was that "they should have known that the articles were false; or they at least should have doubted their accuracy" (App. 33). The court concluded that the evidence was "constitutionally

insufficient" to present a jury question of actual malice (App. 36).

The dissenting opinion, in sharp contrast to the majority opinion, found there was proof of actual malice sufficent to go to the jury in the following language:

> "Factual determinations had to be made in this case in order to ascertain the circumstances under which the publisher acted. There was a conflict in the testimony. The majority opinion accepts Bauer's version of the information related to him by Hartnett. However, Hartnett testified that he had at no time stated or intimated that Lawrence had forged any signatures on or falsely sworn to the propriety of the signatures on the petitions. At trial Hartnett went to great pains to clarify his conversations with the publisher. He maintained repeatedly that he had never linked either Lawrence or Simpson with the forgeries. In fact, he denied ever linking Lawrence to the charge of false swearing. If Hartnett is believed, then Bauer, who asserted Hartnett was the source of the newspaper's information, had no basis for implying that Lawrence had been

> guilty of forgery or false swearing in connection with the petitions. Despite this, Bauer printed the defamatory material relating Lawrence to an alleged forgery. It is questionable whether Bauer acted in good faith under these circumstances. Publication could certainly be held by a jury to fall within the scope of a reckless disregard for the truth. The trial court acknowledged as much when it granted Lawrence a new trial." (App. 66)

The majority decision relied heavily in its decision on the statement in the case of St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262 (1968) to the effect that "there must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication." (App. 34)

The petitioners recognize that the proof of actual malice calls the defendant's state of mind into question, (Hutchinson v. Proxmire, supra Ft. 9). However, in St. Amant v. Thompson, supra, the United States Supreme Court also stated that "the defendant in a defamation action brought

by a public official, cannot, however, automatically insure a favorable verdict by testifying that he published in the belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

The fact situation of the St. Amant v. Thompson, supra is in sharp contrast to the fact situation present in our case. In St. Amant, supra, Mr. St. Amant made a statement concerning the criminal conduct of Mr. Thompson, relying on a story he was told by an informant by the name of Albion. Thompson tried to show actual malice by showing that St. Amant failed to verify the information given him by Albion. The United States Supreme Court held that this was not sufficient evidence to prove actual malice.

In our case the situation is entirely different because the informant testified that for both the January 9th and April 17th article that he never told the defendant that Lawrence and Simpson were under investigation for forgery or false swearing.

This would appear to raise a question not present in the St. Amant v. Thompson, supra as to whether the publication was made in good faith.

Despite the statement made by the New Jersey Supreme Court, the issue is clearly not one of whether the defendant should have known or at least doubted the accuracy of the information given; rather the issue is insofar as the January 9th article is concerned, whether the defendant or his informant is to be believed as to the knowledge that the defendant had concerning the allegations made by the newspaper against Lawrence and Simpson concerning forgery and false swearing. This, the Supreme Court indicated in the St. Amant v. Thompson, supra case, was something for the trier of fact to determine.

We also call the court's attention to Hutchinson v. Proxmire, supra. In this case, the District Court said that in determining

whether a plaintiff had made an adequate showing of "actual malice," summary judgment may well be the rule rather than the exception. The Supreme Court stated:

> "Considering the nuance of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question. New York Times Co. v. Sullivan, 376 U. S. 254 (1964), and does not readily lend itself to summary disposition."

While this matter came before the court, not on a motion for summary judgment but at the end of the plaintiff's case, the effect is the same and the New Jersey Supreme Court has by its decision abrogated the right of the finder of fact to make the determination.

With regard to the April 17th article the issue of actual malice is raised in a different fashion. In this instance the petitioner had demanded a retraction and the defendant, instead of ignoring the demand, chose to reply to the retraction demand in an article on the front page of

of his newspaper. Even the defendant now concedes that the April 17th article was not a retraction and the majority decision of the New Jersey Supreme Court also found that it was not a retraction (App. 6).

The uncontested testimony was that Bauer gave Hartnett a draft of his April 17th article in which he again repeated the allegations of criminal conduct on the part of Lawrence and Simpson. Hartnett testified that he again told Bauer that he was incorrect in reporting that Lawrence and Simpson were involved in criminal conduct.

Hartnett's statement at his deposition (which at the trial he conceded was accurate) concerning the four-way telephone call and the draft of the April 17th article was as follows:

> "I don't know that I can recall exactly specific statements in terms of words I objected to, but I can certainly give you the gist of what I corrected. The draft copy which Mr. Bauer showed to me, he made attribution for statements involving allegations of forgery charges

> against your plaintiff . . .
> Made such attribution to me and
> I indicated to him that that was
> not correct; that at no time I
> had made such statement to him."

As a result, Bauer redrafted the April 17th article in the form in which it was published (App. 106). He attempted to protect himself by having Prosecutor Romankow write a letter which we have quoted at p. 20 of this petition. Romankow admitted that this letter was not intended to accuse Lawrence and Simpson of forgery or false swearing and when he was asked, "You were not trying to imply in any fashion that Mr. Simpson and Mr. Lawrence were under investigation for forgery, were you?", he answered "no".

Bauer used the Prosecutor's letter to justify the statement in the April 17th article that Lawrence and Simpson "are associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths." (App. 106)

It would take a very sophisticated reader to realize that Bauer had retreated from his direct allegation of criminal conduct on the part of Lawrence and Simpson in the January article to merely stating that the petitions were under investigation and that Lawrence and Simpson were not involved in any wrongdoing in connection with the petitions.

Bauer, incidentally, would never confirm or deny what Hartnett told him. For example, he was asked on cross examination:

> "Did he (Hartnett) ever tell you that Mr. Lawrence and Mr. Simpson, personally, were investigated by him for possible forgery of the petition of signatures on the petition?"

His answer was, "What is in the letter, sir?" referring to the letter that Romankow had written.

It would appear that the April article also raises a question concerning whether

or not there was actual malice on Bauer's part. There was no question that in April, Bauer knew that he could not claim (as he said in the January article, that Lawrence and Simpson were involved in criminal charges, but Bauer could not bring himself to print in the April article the one fact that Hartnett had made clear to him; namely, that Lawrence and Simpson were not linked to forgery or false swearing charges. Even if it is assumed that Bauer misunderstood what Hartnett told him about Lawrence and Simpson before he published the January article (something that is doubtful considering Hartnett's testimony), there can be no question that Bauer understood what Hartnett told him in April because Bauer redrafted his article after Hartnett had again told him that he had never linked Lawrence and Simpson to any forger or false swearing charges. This was uncontested by Bauer. The result is that Bauer knew

that his article of January 9th concerning Lawrence and Simpson was false when he printed the April 17th article, but he still persisted in attempting to give the impression that Lawrence and Simpson had some connection with criminal conduct. It should be noted that the New Jersey Supreme Court found, as a matter of law, that both the January article and the April article were defamatory (App. 36).

We believe that the evidence presented concerning the publication of the two articles falls into the class of statement discussed in Garrison v. Louisiana, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 to the effect that:

> "Calculated falsehood falls into that class of utterance which, 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

In any event, this is not a situation as found by the New Jersey Supreme Court where the issue was whether or not the defendant "should have known that the article was false." As the dissenting opinion stated, "He (Hartnett) maintained repeatedly that he had never linked either Lawrence or Simpson with the forgeries" (App. 66). So this is not a St. Amant v. Thompson, supra situation where there was no evidence to indicate that the informant's information was untrue. Here, the informant himself testified that he told the defendant that what he published was untrue.

All this decision points out is the fact that the New Jersey Supreme Court has taken a rather limited view of what evidence should be considered in deciding whether there was actual malice and how that evidence should be interpreted.

The opinion of the New Jersey Supreme

Court, instead of examining the evidence to see whether or not there is substantial evidence to send the matter to the jury on the question of actual malice, has examined the evidence as a finder of fact and determined the publisher only misinterpreted what was told him by the informant. This, we submit, is not what the United States Supreme Court intended when it required a finding of actual malice in St. Amant v. Thompson, supra. The Supreme Court stated that it is the finder of fact who must determine whether the publication was made in good faith. However, the New Jersey Supreme Court, and the contrasting dissenting opinion, has brought into sharp focus the standard of evidence necessary to prove actual malice, and the question of who should have the right to make the determination, the trial court judge or the jury. We believe that the determination of this issue should be

made by the United States Supreme Court. For the reasons expressed above the petitioners request certification on this important issue.

CONCLUSION

It is therefor respectfully submitted that the petition for writ of certiorari be granted.

July, 1982

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SUPREME COURT OF NEW JERSEY
A-19 September Term 1981

ALONZO W. LAWRENCE and
JAMES SIMPSON,

Plaintiffs-Respondents,

v.

BAUER PUBLISHING & PRINTING
LTD., a corporation, KURT
CHRISTOPHER BAUER, JEFFREY
LANCE BAUER and PATSY
BONTEMPO,

Defendants-Appellants.

Argued November 16, 1981 --
Decided April 27, 1982

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 176 N.J. Super. 378 (1980).

J. Roger Conant argued the cause for appellants (Conant and McCreedy, attorneys).

Thomas J. Cafferty argued the cause for amici curiae New Jersey Press Association and The Reporters Committee for Freedom of the Press (Seiffert, Frisch, McGimpsey & Cafferty, attorneys; Mr. Cafferty and A. F. McGimpsey, on the brief).

Paul R. Williams, Jr., argued the cause for respondents.

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The opinion of the Court was delivered by CLIFFORD, J.

This litigation results from the publication in the Rahway News-Record of two articles on the topic of a petition drive in the City of Rahway. Plaintiffs seek damages based on the alleged defamatory nature of both articles. Defendants, the newspaper's publisher, editor and a reporter, assert the defense of truth and the qualified First Amendment privileges protecting newspapers from liability for defamatory statements concerning public figures. The trial court ruled that plaintiff Lawrence was a public figure as set forth in Gertz v. Welch, 418 U.S. 323, 41 L.Ed. 2d 789 (1974), and dismissed Lawrence's claim because of insufficient evidence of defendants' actual malice. The jury returned a verdict in favor of plaintiff Simpson. Lawrence's post-trial motion for a new trial was granted. The Appellate Division affirmed the judgment in favor of

Simpson and the order granting Lawrence a new trial. 176 N.J.Super. 378 (1981).

We agree with so much of the determination below as holds both articles to be defamatory as a matter of law. However, we find both plaintiffs to be public figures for the purposes of this controversy. Therefore, since there is no evidence of actual malice, we vacate the order awarding plaintiff Lawrence a new trial and reverse the judgment in favor of plaintiff Simpson.

I

In 1974 the Rahway Taxpayers Association led by plaintiffs Alonzo Lawrence, the group's president, and James Simpson, its secretary-treasurer, conducted a campaign in opposition to a municipal appropriation for the construction of a new firehouse. The Association, a citizens group made up of Rahway taxpayers, circulated petitions among

Rahway's registered voters in an attempt to force a public referendum on the appropriation issue. Petitions containing over 5,000 signatures were submitted by plaintiffs to the Rahway City Clerk in late December 1974.

On or about January 7, 1975 the Rahway News Record received a telephone call from City Business Administrator Joseph Hartnett, a sometime source of news concerning City affairs. Hartnett spoke first to the editor, defendant, Kurt Bauer, and then to reporter Patsy Bontempo, who had been assigned to cover the controversy surrounding the firehouse appropriation. Although the substance of Hartnett's conversations with Bauer and Bontempo is disputed, the three parties to the conversations agree that Hartnett said at least this: that there were "irregularities" in some of the signatures on the petitions filed by the Association; that the City Prosecutor, Theodore Romankow, was conduct-

ing an investigation of the petitions to determine whether there were incidents of forgery or false swearing in connection with the signatures; and that included in the petitions being investigated were those containing signatures witnessed personally by Lawrence and Simpson.

As part of its ongoing coverage of the firehouse controversy and as a result of the conversations referred to above, the Rahway News-Record published the first of two articles that plaintiffs allege are defamatory. On January 9, 1975 the following headline spanned the entire eight columns of the Rahway News-Record's front page; "City Attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson." The accompanying article stated in pertinent part:

> In separate actions city attorney Alan Karcher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Romankow was asked to take action by

city officials against association leaders because of "irregularities" in the petitions.

The Rahway News-Record learned Mr. Romankow was empowered to handle a case against Alonzo W. Lawrence, president of the Association, and James Simpson, the group's secretary-treasurer.

The case would be based on charges that forgery was involved in the gathering of approximately 5,000 signatures which the two men filed with the city clerk Robert W. Schrof on December 17, the News-Record was told.

In connection with this the men would also be charged with false swearing of oaths and affidavits, it was asserted.

In response to plaintiffs' request that the News-Record retract the allegatios contained in the above-quoted article, the following headline appeared on the front page of the April 17, 1975 edition of the newspaper: "News-Record asked to retract article on firehouse battle." As acknowledged at trial by defendants, the accompanying article was not a retraction of the earlier article.

Rather, it defended the earlier story an accurate account of the facts as made known to the News-Record by "a source in the (City) administration." The April 17th article emphasized that the first article contained no accusations of guilt but merely the assertion that "city officials were turning the petitions over to the local prosecutor, which in fact they did, to investigate allegations of forgery and false swearing of oaths." The article described the Association's sponsorship of the petition drive, and reported that following an investigation by the municipal prosecutor, the petitions were referred to the Union County prosecutor's office "for further investigations of the charges."

In conclusion the newspaper stated:

> The News-Record did not and does not seek to harm Messr. Lawrence and Simpson or to in any way injure their good names. The pair of their own choosing publicly associ-

ated themselves and their organization with the petitions.

The gentlemen, thus, are in fact associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths.

This did not and does not mean, nor was it ever said to mean, the gentlemen are guilty of anything.

Following the publication of the second article plaintiffs instituted this libel action against the Bauer Publishing and Printing Company, owner of the Rayway News-Record; Kurt Bauer, the paper's editor; Jeffrey Bauer, the corporation's president; and Patsy Bontempo, reporter and author of the January Ninth article.[1]

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[1]Slightly more than one year later plaintiffs filed an amended complaint naming Joseph Hartnett as an additional defendant. The trial court granted Hartnett's motion for summary judgment based upon the one year statutory limitations period for libel actions, N.J.S.A. 2A:14-3. 143 N.J.Super. 387 (Law Div.1976). The Appellate Division reversed and remanded. 154 N.J.Super. 271 (1977). We reinstated the trial court's order of dismissal. 78 N.J. 371 (1979)

At the outset of the trial plaintiffs moved for a ruling that the two articles in question were libelous as a matter of law and that the defense of truth should be stricken from the case. The court granted both motions inasmuch as the defendants were unprepared to prove that plaintiffs were guilty of the offenses attributed to them by the articles, namely, forgery and false swearing.

At the close of the case the court ruled that plaintiff Lawrence was a public figure for the purposes of the firehouse dispute. It granted defendants' motion to dismiss Lawrence's claim on the ground that he had failed to present clear and convincing evidence of actual malice on the part of defendants. Observing that plaintiff Simpson did not have the same degree of access to the media as did Lawrence, the court ruled that Simpson was a private figure. Thus, the jury was charged only

with respect to Simpson's claim against defendants. The jury returned a verdict in favor of Simpson against all defendants except the reporter, Patsy Bontempo, and awarded damages in the amount of $22,500.[2]

Following the verdict plaintiff Lawrence requested the court to reconsider its earlier dismissal of his case. Persuaded that the record contained sufficient evidence to raise a jury question as to whether defendants had acted with actual malice, the trial court reversed itself and granted Lawrence's motion for a new trial.

Defendants appealed, asserting as reversable error the trial court's rulings

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[2] The original jury verdict awarded $18,000 in money damages and instructed defendants to publish a full apology and retraction in the News-Record. Following an explanation by the court on the scope of remedies available, the jury redeliberated and returned with the $22,500 figure. The court's action in permitting the further deliberation is not challened here.

striking the defense of truth and holding the articles libelous as a matter of law. Defendants also challenge the ruling that Simpson was not a public figure and the granting of Lawrence's motion for a new trial. Finally, defendants question the language of the jury charge on damages, an issue we do not reach because of our conclusion that both plaintiffs are public figures as set forth in Gertz v. Welch, 418 U.S. 323, 41 L.Ed.2d 789 (1974).

The Appellate Division upheld the rulings of the trial court and affirmed the judgment in Simpson's favor and the award of a new trial to Lawrence. Lawrence v. Bauer Publishing & Printing Ltd., 176 N.J. Super. 378 (1980). We granted defendants' motion for leave to appeal, 87 N.J. 331 (1981).

II

We consider first the defendants' contention that the trial court erred in ruling the two articles defamatory as a matter of law. The effect of that ruling was to remove from the jury the question of whether the articles could reasonably be interpreted as possessing a nondefamatory meaning. The court based its ruling on the tendency of the articles to subject the plaintiffs to public contempt or ridicule. See Garven v. Finch, 97 N.J.L. 329 (E. & A. 1922). Defendants argue that the existence of a defamatory meaning was a question of fact for the jury because the articles did not accuse plaintiff's of any criminal conduct. That approach reveals defendants' confusion as to the meaning of the lower court's use of the term "libel per se."

The terms "libel per se" and "libel per quod" have long been used to differentiate between writings defamatory on their face and those defamatory solely in the light of extrinsic facts. Herrmann v. Newark Morning Ledger Co. 48 N.J. Super. 420, 443 (App.Div.1958). A determination of whether certain language is defamatory on its face rests within the power of the trial court. Leers v. Green, 24 N.J. 239, 255 (1957). Only when the court finds the words to be capable of both a defamatory and a non-defamatory meaning does a question of fact arise for the jury to decide. Herrmann, supra, 48 N.J. Super. at 430. Therefore, the trial court's ruling that the two articles were libelous per se meant the court found as a matter of law that the statements were not reasonably susceptible of a nondefamatory interpretation.

To establish the defamatory nature of the articles it was not necessary for plain-

tiffs to prove that defendants had accused them of the commission of a crime. Words that clearly "sound to the disreputation" of an individual are defamatory on their face. Shaw v. Bender, 90 N.J.L. 147 (E.&A. 1917). The unambiguous import of the two articles is to cast doubt on the reputations of plaintiffs, Lawrence and Simpson. The statement that plaintiffs "may be" charged with criminal conduct diminishes their standing in the community and is little different from an assertion that plaintiffs have actually been charged with certain crimes. Hence the court correctly ruled that the articles were libelous per se, i.e., not susceptible of a non-defamatory interpretation.

III

Defendants assert that the trial court erred in granting plaintiffs' motion to

strike truth as a defense. Under the common law, truth, if established, exonerates the publisher of a defamatory statement of fact. See Medico v. Time, Inc., 643 F.2d 134, 137 (3d Cir.1981); Restatement (Second) of Torts §581A (1977). For the defense to apply, however, the truth must be as broad as the defamatory imputation or "sting" of the statement. See Rogozinski v.Airstream by Angell, Inc., 152 N.J. Super. 133, 146-47 (Law Div.1977) modified, 164 N.J. Super. 465 (App. Div. 1979); W. Prosser, Law of Torts §116 (4th ed.1971). See also Medico, supra, 643 F2d at 137; Rogers v. Courier Post Co., 2 N.J. 393, 401 (1949).

After hearing argument on plaintiffs' motion to strike the defense of truth, the trial court determined that defendants' publication of the statements that plaintiffs were suspected of and being investi-

gated for committing the crimes of forgery and false swearing imputed to plaintiffs the very commission of those crimes. Therefore, the court ruled that defendants could not assert the justification of truth unless they were prepared to prove not only that the reported investigation was conducted or that "forgery charges loomed," but also that plaintiffs did in fact commit forgery and false swearing. See Restatement (Second) of Torts §581A, comment c, at 236 (1977). When defense counsel conceded that he was unprepared to prove that plaintiffs had in fact committed the criminal offenses imputed to plaintiffs, the trial court ordered the defense of truth stricken from the case.

The Appellate Division affirmed the trial court's determination:

We are, therefore, entirely satisfied that a publisher of a statement which is defamatory by suggestion or insinuation, must, in order to present an adequate defense, prove more than that the article was literally true. That the information was received from another source is not enough. To sufficiently develop the defense of truth under the facts of this case, defendants must show that plaintiffs had in fact committed the offenses or that they had been formally charged with criminal conduct or that police or county prosecuting authorities had announced an official investigation of plaintiffs for the offenses described in the articles.

[176 N.J.Super. at 389-90 (footnote and citation omitted).][3]

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[3] The final portion of the quoted statement refers to the privilege of "fair report," a qualified privilege that permits the republication of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them. See N.J.S.A. 2A:43-1. This privilege was not seriously asserted by defendants since the source of their information was not one covered in the statute.

There is considerable authority for the proposition that the fact that defendants accurately reported information obtained from another source will not relieve them of liability. Under that analysis the defense of truth does not refer to the truthful republication of a defamatory statement but to the truth of the statement's contents. Restatement (Second) of Torts § 578, comment b, at 235-36 (1977). Thus, if defendant published that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement. Rogers, supra, 2 N.J. at 501-02. Defendant must prove that in fact plaintiff committed the crime. See L. Eldridge, Law of Defamation §67 at 331 (1978). Similarly, a statement that criminal charges were imminent would be truthful only if such charges were demonstrably impending.

The trial court viewed the statement in this case as imputing to plaintiffs the crimes of forgery and false swearing and therefore imposed on defendants the burden of proving that plaintiffs had actually committed those crimes. A more literal reading of the headlines indicates that the correct interpretation may have been that charges of forgery and false swearing were forthcoming. Whether the "truth" defense should be framed in terms of proof that defendants committed the crimes referred to in the article or simply that charges concerning those charges might "loom" is a provocative question we need not decide today, given our holding that plaintiffs were public figures who have not demonstrated the requisite malicious libel by defendants necessary to sustain a libel judgment.

IV

Ultimately, the successful invocation of a constitutional privilege in this case is controlled by whether defendants fall into the category of public or private figures. It is well settled that in defamation actions the existence vel non of privilege is basically a question of law for the court's determination. See, e.g., Barbetta Agency, Inc. v. Evening News Publishing Co., 135 N.J. Super. 214, 218 (App.Div.1975); Sokolay v. Edlin, 65 N.J.Super. 112, 124 (App. Div. 1961). In the case before us, because the news media's right to speak freely and to disseminate newsworthy information about public figures is intricately related to First Amendment guarantees, the public figure question is one involving a limited constitutional privilege and is therefore a matter of law for the

trial court to decide. See Rebozo v. Washington Post Co., 637 F.2d 375, 379 (5th Cir.1981); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1247 (5th Cir.1980); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861-62 (5th Cir.1978); Meeropol v. Nizer, 560 F.2d 1061, 1066 & N.6 (2d Cir.1977). In the landmark case of New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686 (1964), the Supreme Court held that the First Amendment guarantees of free speech and press give rise to a limited constitutional privilege in the case of certain publications. Under New York Times a newspaper is protected from liability for publishing a defamatory report about the official conduct of a public official unless there is clear and convincing evidence that the newspaper published with "'actual malice' -- that is, with

knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 11 L.Ed.2d at 706. A demonstration of actual malice is also necessary in cases where the plaintiff is not a public official but can be identified as a public figure, Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L.Ed. 2d 1094 (1967), either for all purposes or for the purposes of only the events upon which the defamatory publication was based. Gertz, supra, 418 U.S. at 351, 41 L.Ed.2d at 812. Thus, the existence of the privilege is controlled by the status of the person defamed.

Gertz refrains from establishing specific criteria against which a plaintiff's status can be measured to determine whether or not he is a public figure. Rather in instances where the plaintiff is not a public figure for all purposes, Gertz calls

for a case-by-case examination "looking to the nature and extent of an individual's participation in the particular controvery giving rise to the defamation," 418 U.S. at 352, 41 L.Ed.2d at 812. Important factors that led the Court to conclude that the Gertz plaintiff was not a public figure included plaintiff's lack of any calculated relationship with the press and the fact that he neither "thrust himself into the vortex of this public issue, nor [engaged] the public's attention in an attempt to influence its outcome." Id.

With Gertz as a framework for our analysis we turn to a consideration of whether plaintiffs are public or private figures. Plainly, these plaintiffs are not public figures for all purposes; neither possess the requisite "pervasive fame or notoriety." Id. Therefore, we confine our examination to whether either was a public figure with regard only to the firehouse

appropriation controversy and the petition drive they spearheaded to force a public referendum on the matter.

Lawrence

The undisputed facts concerning Lawrence's participation in the fire-house controversy justify the conclusion that the voluntarily thrust himself into the forefront of that dispute. Lawrence, the founder and president of the Association, regularly attended city council meetings and spoke out against what his organization believed was an excessive appropriation for the proposed city fire-house. At one such meeting he was one of only five people permitted by the city council to speak on this issue on behalf of the public. He also attended an open public meeting concerning the appropriation ordinance and there again spoke out against the appropriation.

When his cause appeared to be defeated by the mayor and city council, Lawrence initiated the petition drive through the Taxpayer's Association, with the goal of obtaining a sufficient number of signatures to force a public referendum. Lawrence was one of five Association officers and members whose names appeared on every petition sheet circulated. In circulating the petitions Lawrence personally canvassed Rahway neighborhoods house to house, explaining to residents the purpose of the petition drive and obtaining their signatures on the petition sheets. He visited at least fifty homes and collected at least two hundred signatures. Consequently, there is substantial credible evidence to support the lower courts' determination that Lawrence voluntarily injected himself into the forefront of the public controversy surrounding the firehouse appropriation issue, which gave rise to the defamation for

which he seeks to recover. Moreover, Lawrence's obvious purpose in thrusting himself into a major role in the public controversy was to influence the resolution of the issue involved. See Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 168, 61 L.Ed.2d 450, 460-461 (1979; Gertz, supra, 418 U.S. at 341, 41 L.Ed.2d at 812.

In addition, Lawrence received extensive exposure in the local press. On several occasions prior to the January Ninth article he provided press releases to the Rahway newsaper. Moreover, the trial court determined that in the few weeks prior to the publication of the January Ninth article, Lawrence's name had been mentioned and his most recent activities discussed in approximrtely twenty published articles (some in headlines reporting on the firehouse dispute. Lawrence therefore "enjoy [ed] significantly greater access to the

channels of effective communication and hence [had] a more realistic opportunity to counteract false statements than private individuals enjoy." Gertz, supra, 418 U.S. at 344, 41 L.Ed.2d at 808. This access to the media, taken together with Lawrence's active and significant participation in the public controversy giving rise to the defamation, leads us to agree with the determination of the lower courts that as a matter of law, Lawrence is a public figure for the limited purposes involved here.

Simpson

The record discloses that as secretary-treasurer of the Rahway Taxpayers Association, Simpson actively participated in the petition drive. He was one of the five-member committee of petitioners whose names appeared on every petition sheet circulated by the Association. Simpson

personally collected approximately 250 petition signatures as a result of his door-to-door efforts, and on at least one occasion he wrote a letter to the editor on the issue of the firehouse appropriation. The day the petitions were filed, Simpson notified the Rahway News-Record and requested the presence of a photographer at the delivery. The resulting photograph portraying Simpson, among others, turning over the petitions, was published in the December 31, 1974 issue of the News-Record.

Although the factors delineating Simpson's status are less compelling than those relating to Lawrence, we hold that Simpson is also a public figure for the limited purposes of the firehouse appropriation and petition controversies. This conclusion is derived from our close scrutiny of Simpson's activities during the course of the firehouse controversy and

the subsequent submission of the petitions. Both lower courts, perhaps befause of the much more extensive activity of Lawrence, failed to perceive that Simpson was similarly in the forefront of the controversy. The proper determination of public figure status involves a measuring of the degree of plaintiff's participation in a particular activity, not a relative comparison of the involvement of two separate participants. The analysis focuses on Simpson's relationship to the controversy as a whole. Although his participation was not as extensive as Lawrence's, it far exceeded the role of a private figure.

V

After the jury returned the verdict for plaintiff Simpson, the trial court granted plaintiff Lawrence's motion for a new trial. In so doing the court reversed its own prior dismissal of Lawrence's

cause of action. The Appellative Division affirmed without comment the order for a new trial. 176 N.J.Super. at 396.

As stated previously, in order to meet the "actual malice" test of New York Times v.Sullivan, supra, a public figure must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false. 376 U.S. at 279-80, 11 L.Ed.2d at 706. "Reckless disregard" in this context refers to the publishing of defamatory statements with a "high degree of awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74, 13 L.Ed.2d 125, 133 (1964). In St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262 (1968), the Court emphasized the stringent evidentiary standard necessary to prove recklessness, stating:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> [390 U.S. at 731, 20 L.Ed.2d at 267.4][4]

Put differently, the recklessness in publishing material of obviously doubtful varacity must approach the level of publishing a "knowing, calculated falsehood." Ryan v. Brooks, 634, F.2d 726, 733 (4th Cir.1980).

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[4] In St.Amant, supra, Justice White reflected on examples of reckless conduct that might be inferred from circumstantial evidence, including publication of a completely fabricated story, a publication based entirely on an unverified anonymous telephone call, or publication where there are obvious reasons to doubt the veracity of the information reported. 390 U.S. at 732, 10 L.Ed.2d at 268.

In light of this stringent standard we have carefully examined the record below to determine whether the evidence at trial was sufficient to present a jury question as to actual malice. That examination reveals that there was insufficient evidence of actual malice toward either plaintiff. For that reason the order granting Lawrence a new trial cannot stand.

Although a belief in the truth of the matter published is insufficient to sustain the defense of truth, it is relevant in determining whether the defendant showed actual malice in regard to the truth or falsity of the publication. See Restatement (Second) of Torts §581A, comment h, at 237 (1977). Here, defendants honestly believed that the concededly misleading statements published in the two articles were true. Their misconceptions arose primarily from their conversations with Hartnett in which

he told them that the petitions were under investigation for possible evidence of false swearing and forgery. Having been informed by Hartnett that petitions witnessed by both Lawrence and Simpson were among those being examined, defendants thought it was a reasonably certain implication that any such investigation would center around the activities of Lawrence and Simpson, who were known by the newspaper to be the key figures in circulating and filing the petitions.

Lawrence's post-trial argument that persuaded the trial court to reverse its earlier dismissal of his case was essentially nothing more than this: based upon the information the defendants received from Hartnett and City Prosecutor Romankow prior to the publication of the two articles, they should have known that the articles were false, or they at least should have doubted their accuracy. But the liability

question is not one of the reasonableness when public figures and media defendants are involved. Rather, the focus of the "actual malice" inquiry is on a defendant's attitude toward the truth or falsity of the publication, Dupler v. Mansfield Journal Co., Inc. 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980); on his subjective awareness of its probable falsity, Rosanova v. Playboy, supra, 580 F.2d at 862; and his actual doubts as to its accuracy, Ryan v. Brooks, supra, 634 F.2d at 732. Cf. Herbert v. Lando, 441 U.S. 153, 199-200, 60 L.Ed.2d 115, 148-49 (Stewart, J., dissenting) (1979) ("actual malice" in the New York Times v. Sullivan sense has nothing to do with hostility or ill will; rather it concerns publisher's "state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it * * * .").

Neither "errors of interpregation of judgment" nor "misconceptions" are sufficient to create a jury issue of actual malice under the New York Times standard. See Time, Inc. v. Pape, 401 U.S. 279, 290, 28 L.Ed.2d 45, 53 (1971); Ryan v. Brooks, supra, 634 F.2d at 733. The Supreme Court has held that "if 'the freedoms of expression are to have the "breathing space" that they "need * * * to survive,"' misstatements of this kind must have the protection of the First and Fourteenth Amendments." Time, Inc. v. Pape, supra, 401 U.S. at 292, 28 L.Ed.2d at 54 (quoting New York Times, supra, 376 U.S. at 271-72, 11 L.Ed.2d at 701). "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." St. Amant, supra, 390 U.S. at 732, 20 L.Ed. 2d at 267.

There is not "clear and convincing" evidence that defendants knew that the defamatory publications were false, or that they actually doubted their accuracy. See Ryan v. Brooks, supra, 634 F.2d at 732. Rather, as originally concluded by the trial court, defendants published a careless and perhaps irresponsible account of the information received concerning the scope of the City Attorney's investigation. But the evidence in the record is "constitutionally insufficient" to present a jury question of actual malice. See New York Times, supra, 376 U.S. at 288, 11 L.Ed.2d at 711; Ryan v. Brooks, supra, 634 F.2d. at 735.

VI

The articles published by defendants are defamatory as a matter of law. It is unnecessary for us to decide the issue of

truth as a defense. The Court having determined that both parties are public figures for the limited purposes of the firehouse appropriation and the petition controversy, defendants are protected by a qualified First Amendment privilege unless there is clear and convincing evidence that they acted with actual malice toward plaintiffs. Whatever the evidence of malice, it is insufficient to present a jury question on the issue.

Accordingly, we vacate the order granting plaintiff Lawrence a new trial and reinstate the judgment in favor of defendants. We reverse the judgment in favor of plaintiff Simpson and enter judgment for defendants.

Chief Justice Wilentz and Justice Pashman, Handler, Pollock and O'Hern join in this opinion. Justice Schreiber has filed a separate dissenting opinion.

SCHREIBER, J., dissenting.

Two highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years.[1] This is the result of their sincere attempt to participate in local government. One, Simpson, is brought down by the Court's unnecessarily expansive interpretation of what constitutes a "public figure." The other, Lawrence, loses his claim because a publisher who charged him with forgery is found by this Court not [illegible] acted with a reckless disregard of the truth, irrespective of the fact that a jury could have found that the publisher had no basis for the libelous statement. I dissent from both holdings.

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[1] See appendix for reprint of initial article.

I

The First Amendment right of freedom of the press does not immunize a publisher from liability for printing and disseminating libelous statements. When the First Amendment was advocated and adopted it was the settled view that the press would continue to be responsible for defamatory comments and the ensuing injury inflected on the individual. See generally State v. Allen, 73 N.J. 132, 172-74 (1977) (Schreiber, J., concurring) (pointing out that the Framers' concept of freedom of the press was centered upon prior restraint and that common law libel was to remain untouched). See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 381-84, 94 S.Ct. 2997, _____, 41 L.Ed.2d 822, 829-30 (White, J., dissenting). Though subsequent construction of the First Amendment was not so limited, the cause of action for defamation, at least

where the statement involved false factual material, remained unimpaired. See Rabban, "The First Amendment in Its Forgotten Years," 90 Yale L.J. 514 (1981).

The Supreme Court modified this principle in 1964 in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In balancing the press's constitutional right to report on public affairs against the damage to the reputation of a public official, the Court limited recovery to those situations where the public official proved either that the publisher knew the statement was false at the time it was published or printed the article in reckless disregard for the truth. Insofar as a public official was concerned, this was considered to be an appropriate accomodation between the interest in an uninhibited press and the official's need for redress of libelous statements.

In the companion cases, Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the New York Times principle was applied to "public figures" as well as public officials. The application was made without defining the term. It was not until Gertz v. Welch,[2] 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that the Court laid down the guidelines. In that case a monthly publication, American Opinion, printed defamatory remarks charging a well-known Chicago lawyer with participation in a Communist campaign against the police. This lawyer had represented the family of a young man who had been killed by a Chicago

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[2] Prior to Gertz, a plurality of the Supreme Court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), advocated that the determinant should be whether the statements related to a public issue. This rationale was based on the idea that public issues should be debated freely, widely and openly, thus recognizing that this might well permit sharp attacks on government officials.

policeman only in a civil action, not in the policeman's criminal trial. The Supreme Court rejected the notion that the lawyer was a public figure.

The Court justified the application of the New York Times rule to public officials and public figures for two reasons. These individuals usually enjoyed significantly greater access to the news media and therefore had a more realistic opportunity to counteract false statements. More importantly, the public officials voluntarily sought and accepted the public office and had to accept the "necessary consequences." As for public figures, they were a limited group who had invited attention and comment.

The Gertz decision defined the public figure as (a) those who have "assumed roles of especial prominence in the affairs of society," and (b) those who have thrust themselves to the forefront of particular public controversies in order to influence

the resolution of the issues involved. We are particularly concerned in this case with the second category since the defendant has conceded that neither Lawrence nor Simpson had achieved generally "especial prominence in the affairs of society" leading to "such pervasive fame or notoriety," so as to become "a public figure for all purposes and in all contexts." Id. at 351, 41 L.Ed. 2d at 812. The Court warned that it "would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." Id. at 352, 41 L.Ed.2d at 812.

Gertz prescribed four characteristics of the second group. First, the individual had to voluntarily inject himself into the controversy. Second, the controversy had to be a public one. Third, by virtue of the public controversy, the individual became a public figure for a limited range of issues. Fourth, the person had to

The case received substantial newspaper publicity and Mrs. Firestone had called several press conferences during the trial. The Supreme Court upheld the judgment and rejected the contention that she was a public figure. It reasoned that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." Id. at 454, 47 L.Ed.2d at 163. It observed that she was compelled to go to Court in the divorce action and concluded that "[s]he assumed no 'special prominence in the resolution of public questions.'" Id. at 454-44, 47 L.Ed. 2d at 163.

The Supereme Court next considered the public figure concept in two cases decided the same day, Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411

(1979), and Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). In Hutchinson, Senator Proxmire was sued for defamation arising out of his "Golden Fleece" award, which he granted with attendant publicity to those involved in supposedly wasteful governmental expenditures. One such case concerned funding a study by Hutchinson of emotional behavior of certain animals. The Court rejected the notion that Hutchinson had "the regular and continuing access to the media [prior to the award] that is one of the accoutrements of having become a public figure." Id. at 136, 61 L.Ed.2d at 432. The publicity created by the defamatory statement could not be used to make Hutchinson into a "public figure."

The second case involved Ilya Wolston who sued for defamatory statements made about him in a book published by the Reader's Digest Association. The Supreme Court

reversed lower court rulings that he was a public figure. A special federal grand jury had been conducting a major investigation into the activities of Soviet intelligence agents in the United States. When Wolston did not respond to a grand jury subpoena, at least seven news stories appeared in New York and Washington newspapers. Subsequently, Wolston pleaded guilty to contempt for failure to appear and the newspapers reported this event. In all, during the six-week period between his non-appearance and sentencing, fifteen stories were printed in Washington and New York papers. Thereafter the publicity subsided.

The Supreme Court observed that the mere fact Wolston voluntarily chose not to appear before the grand jury was not decisive. It emphasized that the focus must be on the "nature and extent of an individual's participation in the particular controversy giving rise to the defmation." Id. at 167, 61 L.Ed.

2d at 460, quoting Gertz v. Welch, supra, 418 U.S. at 352, 41 L.Ed.2d at 812. The Court significantly observed:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention...A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times. [Id.]

The Court went on to state that Wolston's failure to respond to the subpoena was not "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue." Id. at 168, 61 L.Ed.2d at 460.

These cases point rather clearly in the direction that there must be strict compliance with all the requisites defined in Gertz before the handicap of becoming a public figure is imposed. When these criteria are applied to Simpson, he falls far short of attaining the status of a public figure. Two guidelines were met.

The controversy involved the proposed municipal expenditure of an additional $100,000 for a firehouse. This unquestionably was a public controversy. Second, Simpson had voluntarily injected himself into it. However, he did not by virtue of that controversy become a public figure for the limited range of issues involved. Nor did he assume special prominence in the resolution of the firehouse question. The trial court's conclusion that Simpson was not a public figure was based on these two latter elements.[3]

At the time of trial, Simpson was 68 years old and had lived in Rahway for 45 years. He had retired in 1973 from his job

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3 Contrary to the majority's conjecture that the lower court's evaluation of Simpson was deficient because Simpson's participation was dwarfed in comparison with that of Lawrence (slip op. at 21), the trial court analyzed Simpson's situation "as though [he was] the only plaintiff in the case."

as a production foreman in a book publishing plant. His participation in local affairs had been confined to the local First Aid oranization and the Rahway Taxpayers' Association, a civic group formed to act as a watchdog over municipal expenditures. Simpson had written two letters to the editor of the Rahway News-Record on the firehouse controversy, one arguing against the increased expenditures and the other responding to a critic of the first letter. Of the thirteen articles related solely to the firehouse controversy submitted into evidence at the trial, only one of them mentioned Simpson. That article was accompanied by a picture depicting the transmittal of the petitions by members of the Taxpayers Association to the City Clerk. Simpson was part of this group photograph. Though Simpson had spoken at monthly Town Council meetings, as had other citizens, the record

does not disclose on how many, if any, occasions he spoke on the firehouse issue. He obtained between 250 and 275 signatures on petitions seeking a public referendum on the question. The solicitation was carried on by about 20 others who ultimately obtained approximately 5,000 signatures. His name appeared on the petitions as one of a committee of five, it being a statutory requirement that petitions be in that form. He had also joined in the lawsuit against the City, which had rejected the petitions on the ground that a public referendum was not available to review an ordinance appropriating funds.

One could reasonably conclude, as did the trial court, that Simpson had not risen to that special prominence by virtue of his activities on the firehouse controversy. He had not sought to draw attention to himself to influence the public. He was part of a team of citizens who attempted to

have the public vote on the issues. Though his role may have been somewhat more noticeable than others, he had not attained a special prominence because of the local publicity prior to the defamatory publications. The trial court's comments are worthy of repetition:

> He was not in the vortex of this fight. He did not get the newspaper publicity. He acted more or less as a private citizen in attending meetings, making an occasional dispute. There's a dispute in the number of speeches he made. He talked ... occasionally at least and I do not think he meets the standards. So the Court will hold that Mr. Simpson, for the purposes of this litigation, is not a public figure.

Important policy reasons justify this result. As noted previously, the New York Times ruled exposing public officials and public figures to defamatory statements reflected an accommodation between reducing the inhibition on freedom of the press and the individual's right to redress for

defamation. Yet, this case demonstrates that an added dimension should be considered, the individual's right to free speech. This Court today recognizes that:

> [r]ecent developments in the law of libel and defamation have been directed toward preventing people from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. [Kotlikoff v. Community News, ___ N.J. ____ (1982]

It has been said that "[c]riticism of government is at the very center of the constitutionally protected area of free discussion." Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, ___, 15 L.Ed.2d 597, ___ (1966). The First Amendment protects an individual's activity in speaking in public forums, Hague v. CIO, 370 U.S. 496, 515-16, 83 L.Ed. 1423, 1436-37 (1939), and in canvassing neighborhoods of private homes, Hynes v, Manor of Oradell, 425 U.S. 610, 616-17, 48 L.Ed.2d 243, 250-51 (1976). See also id. at

624-25, 48 L.Ed.2d at 255-56 (Brennan, J., concurring). These twin First Amendment rights insure that people seeking to communicate with the public have two readily availalbe channels of public communication.

A freely expansive notion of a public figure in the context of this case defeats the major underlying purpose of the New York Times principle. It will throttle rather than foster public debate and criticism. The chilling effect on the individual's right of free speech is real. This case illustrates what may occur. After the libelous newspaper article appeared, Simpson stopped attending and speaking out at municipal council meetings. Lawrence, too, had second thoughts about his activity, though he decided to continue. Citizen participation in local governmental affairs is to be encouraged, not discouraged. Broadly construing "public figures" to embrace townspeople whose only notoriety relates to

debate over a local governmental controversy of the type exemplified in this case is counterproductive.

Professor Eldredge, in his treaties The Law of Defamation (1978), has graphically demonstrated the point:

> The Courts are in a most critical and delicate area in considering what persons, who voluntarily inject themselves into public controversies and take positions on matters which are clearly "public issues," should be subject to the New York Times standard. A broad extension of this standard could be an instrument to destroy the very freedom of speech in whose name the extension is demanded. One of the great needs in contemporary America is to encourage more good people to participate in government, to speak out, and stand up and be counted, on important questions. How often do leading lawyers, doctors, bankers, business men, raise their voices of complaint and critical discussion of a public issue around their luncheon tables, and how seldom are they willing to say the same thing publicly and give the general public the guidance which is needed? Far too often, even our bar associations show timidity in coming out forthrightly on matters in which they could provide great guidance. Far too often, the citizen of some stature in the community who is willing to be quoted

in a newspaper or be interviewed on radio or television on any important controversial question, seems to be a lone wolf howling in the wilderness. Such people may or may not "seek" the spotlight of the stage of public opinion but they generally get into it by saying what they deeply believe must be said. Suppose the private citizen criticizes the Board of Magistrates and charges corruption in the disposition of gambling cases in the city. If there can be unleased against him a stream of false defamation under the protection of New York Times, his voice will soon be silenced, or made ineffective. And seeing this result, who will dare to speak out again in the same vein? Unbridled defamation concerning matters of public concern was a tool the Nazis used in pre-World War II Germany to destroy important men and render useless what they said, the men whose messages desperately needed to be heeded. How much is freedom of speech really advanced by a constitutional rule which says: "Once you speak out on a question of public interest you become fair game for the John Birch Society, for every venomous newspaper editor, and for everybody else who wants to destroy you and the power of what you say?"

I fully realize that this argument cuts both ways. But the only justification for New York Times,

> in its drastic cutting down of the scope of actionable defamation, (and its destruction within its scope of the precious right of public vindication of one's good name) is that it is necessary in order to encourage people to speak out on important questions. If, in fact, the privilege will in some situations encourage people to speak out and, in others, discourage them, then only the net gain for free speech should be weighed against the value of reputation, in striking the balance on the scale of constitutional law. We cannot determine the balance, as some writers seem to do, by merely putting the value-weight of a good reputation on one side of the scale and the value-weight of completely uninhibited free speech on the other. That smacks too much of the butcher putting his thumb on the scale. [Id. at 283-85; (footnotes omitted)]

II

I also agree with the trial court that there was sufficient evidence with respect to Lawrence's claim warranting submittion of the issue of defendant's "actual malice" to the jury. New York Times defined actual malice to be either the publication of a

defamatory statement actually known to false or the publication in reckless disregard of its truth or falsity.

St. Amant v. Thompson, 390 U.S. 727, S.Ct. 1323, 20 L.Ed.2d 262 (1968), upon which the majority so heavily relies, does not draw a bright line between what may or may not constitute a reckless disregard for truth. Rather, it recognizes that no simple definition exists for "reckless disregard." "Reckless disregard ... cannot be fully encompassed in one infallible efinition. Inevitably its outer limits will be marked out through case by case adjudication...." Id. at 730, 20 L.Ed.2d at 267.

The majority has stressed a part of the St. Amant opinion that indicates that reckless conduct is not measured by a reasonably prudent man standard and that there must be sufficient evidence to demonstrate "that the defendant in fact entertained serious doubts as to the truth of his

publication." (Ante at ____ , quoting 390 U.S. at 731, 20 L.Ed.2d at 267). If this were the only message in St. Amant, I would be constrained to agree with the majority's conclusion. However, St. Amant also states:

> The defendant if a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he publish with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. [390 U.S. at 732, 20 L.Ed.2d at 267-68]

This passage imposes on the publisher an element of good faith. Thus, where a publisher acts based on an unverified

anonymous telephone call even though he may in fact not entertain serious doubts about the truth, he may be found to have acted with a reckless disregard of the truth. The factual setting in St. Amant is instructive. Thompson, a deputy sheriff, sued St. Amant, a political candidate, for quoting in a campaign speech statements made about him by J. D. Albin, a member of a local union. Thompson could prove that the statements were defamatory and false, but could not show that St. Amant knew of their falsity. Thus, the issue was whether St. Amant made his speech with a reckless disregard to the truth. The Court decided that St. Amant's reliance upon Albin was not reckless under the circumstances. St. Amant had relied on other occasions upon information recieved from Albin without incident. These prior dealings sufficed to give St. Amant confidence in Albin, so that his

repetition of Albin's statements was not a reckless disregard of the truth.

St. Amant does not stand for the proposition that libel defendants have immunity so long as they testify that they believe what they wrote was true. The Courts will examine the circumstances and decide whether the individual who should have entertained serious doubts about the truth, recklessly went ahead. This is the interpretation that several federal circuit courts have attributed to St. Amant.

In Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976), the defendant had published a story indicating that Johnny Carson, the well-known late-night entertainer, had moved the site of his television show so as to be near the woman who had caused the breakup of his first marriage. The facts showed that the woman in question not only did not live in California but that

Carson did not meet her until after he and his first wife had separated. The court found that the reporter had no basis for much of his story, attributing the published statements to his imagination, and consequently found recklessness possible--regardless of whether the reporter actually believed the import of his story to be truthful.

In Guam Federation of Teachers v. Ysrael, 492 F.2d 436 (7th Cir.), cert. denied, 419 U.S. 872, ___ S.Ct. ___, 42 L.Ed.2d 111 (1974), the court held there was a jury issue as to whether the statements were made with "malice." The court wrote:

> He repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing, to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or upon nothing at all. He simply asserted that he believed that what he said was true. Such an assertion is not enough to support a directed verdict in his

favor. If it were, mere swearing could, as a matter of law, defeat any action to which the New York Times principles are applicable. See St. Amant v. Thompson, 1968, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262. [Id. at 439]

In Godwater v. Ginzberg, 414 F.2d 324 (2d Cir. 1969), the defendant argued that he should not be liable for defamatory remarks made about Senator Goldwater's psychological stability because he based his observations on other sources. While the court did find that Ginzberg did not merely repeat these statements but added certain innuendoes to them, it also emphasized that lack of adequate investigation has been an important fact in proving "reckless disregard for the truth." Since the article did not contain "hot news," the Second Circuit thought that the seriousness of the charges called for a through investigation, yet the evidence revealed "only the careless utilization of slipshod and sketchy investigation techniques...." Id. at 339.

See also Vandenberg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir. 1971) (stating "[t]he Supreme Court has held that actual malice may be inferred when the investigation for a story which is not 'hot news' was grossly inadequate in the circumstances").

A belief by the publisher that otherwise defamatory charges are true does not preclude a finding of liability. Jurors should be allowed to consider all the evidence concerning defendant's act in deliberating upon whether the defendant published with actual malice. Did the publisher act in good faith? Was there a source of the information? Was that source reasonably, from the publisher's standpoint, relied upon? The St. Amant standard, as I understand it, will in no way trench upon the freedom of a responsible press.

Factual determination had to be made in this case in order to ascertain the

circumstances under which the publisher acted. There was a conflict in the testimony. The majority opinion accepts Bauer's version of the information related to him by Hartnett. However, Hartnett testified that he had at no time stated or intimated that Lawrence had forged any signatures on or falsely sworn to the propriety of the signatures on the petitions. At trial Harnett went to great pains to clarify his conversations with the publisher. He maintained repeatedly that he had never linked either Lawrence or Simpson with the forgeries. In fact, he denied ever linking Lawrence to the charge of false swearing. If Hartnett is believed, then Bauer, who asserted Hartnett was the source of the newspaper's information, had no basis for implying that Lawrence had been guilty of forgery or false swearing in connection with the petitions. Despite this, Bauer printed the defamagory material relating

Lawrence to an alleged forgery. It is questionable whether Bauer acted in good faith under these circumstances. Publication could certainly be held by a jury to fall within the scope of a reckless disregard for the truth. The trial court acknowledged as much when it granted Lawrence a new trial.

I would affirm.

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APPENDIX

RAHWAY News Record

New Jersey's Oldest Weekly Newspaper – Established 1822

VOLUME 113 NO. 54 | RAHWAY, NEW JERSEY, THURSDAY, JANUARY 9, 1975 | 15 CENTS

12-11-74

LAWRENCE WARNS MAYOR ON LIBEL

City attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson



ATOMIC ATIRE TO RAHWAY — A demonstration bureau on atomic energy and its uses, sponsored by the Union Associated Universities of Oak Ridge, Tenn., will be presented at Franklin School on Monday, January 20, Rahway Senior High School on Tuesday, January 21, and Rahway Junior High School on Wednesday, January 22. The program, whose title is being displayed by John Pendry, the program speaker, is designed to acquaint students with the basic principles of nuclear energy, its sources and its commercial and scientific applications.

In separate actions city attorney Alan Kanzher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Rumsaker was asked to take action by city officials against association leaders, some of whom "irresponsibly" [illegible] the petitions.

The Rahway News-Record learned Mr. Rumsaker was empowered to institute court action against Abram W. Lawrence, president of the association, and James Simpson, the group's secretary-treasurer.

The city's case would be based on charges that forgery was involved in the gathering of approximately 1,000 signatures which the two men filed with City Clerk Robert W. Imbesi on December 27, The News-Record was told.

In connection with this the two would also be charged with false swearing of oaths and affidavits, it was learned.

The signatures sought were part of a petition drive launched by members of the group in an attempt to take a public referendum on an additional $300,000 appropriation for the Main Street firehouse approved by city councilmen at their December 9 session.

Councilmen overrode and voted [illegible] additional appropriation [illegible] the city [illegible] contracting [illegible] the case of Capparelli versus the city of Jersey City, the association's petitions are "improper" and "of no force and effect and should be disregarded."

In the ruling it was stated "In the absence of a clear, positive and unambiguous mandate by the legislature, the majority view is that ripping resolutions and budget ordinances or resolutions are not subject to initiative and referendum."

A copy of the attorney's decision was sent by certified mail to Messrs. Lawrence and Simpson by the clerk on January 2.

Meanwhile Mr. Lawrence renewed orally and angrily to charges made by Mayor Daniel L. Martin and reported in the December 26 issue of The Rahway News-Record.

In that issue the mayor said Mr. Lawrence's continued opposition to acquiring firehouse bids above the original low bids of $160,000 received in 1973 was the major cause of the increased costs for the new structure.

Mr. Lawrence accused the mayor of making a "complete fabrication" on this point. He said the 1973 bids were for a three-bay firehouse while the current contracted cost of $300,000 is for an eight-bay building.

In the mayor's statement that Mr. Lawrence has been a firehouse foe for the past 11 years, Mr. Lawrence said, "The only [illegible] I ever [illegible] was [illegible] I felt [illegible] Mr. Lawrence claimed neither he nor the association ever opposed the construction of a new firehouse but insisted their opposition has been to the proposed site and the closing of Seminary Avenue operations.

He called an emergency "an over-dramatized building which provides space for the housing of all fire equipment [illegible]

Poll shows residents want Seminary open

By Perry Swanepoe

About 65% of the Rahway voters who are aware of the issue are opposed to the construction of the Main Street firehouse if it means closing the Seminary Avenue firehouse according to a poll taken by The Rahway News-Record.

The opposition was over 2 to 1 with only 30% supporting the new firehouse with the qualification.

Of the 65%, about 7% would support a modified version of the Main Street firehouse if the headquarters on Seminary Avenue remained operative.

The poll was undertaken by the newspaper to gauge the true sentiments of Rahway voters. The telephone interviews were conducted the evenings of January 6 and 7 and the mornings of January 8 and January 9.

In order to obtain a representative sampling of the approximately 14,000 registered voters, 44 interviews were conducted of slightly more than one half of one percent of the electorate.

The interviews were equally divided among the six wards and against city [illegible] lines.

Poll results

Question	Total	Male	Female
No. 1 Yes	[illegible]	[illegible]	[illegible]
No	[illegible]	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]
No. 2 Yes	[illegible]	[illegible]	[illegible]
No	[illegible]	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]
No. 3 Yes	[illegible]	[illegible]	[illegible]
No	[illegible]	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]

The telephone calls were made to obtain the sampling responses.

If a respondent refused to participate his response was unrecorded. Calls to previous names with the following sentences.

"The city plans to construct a new firehouse on the Main Street parking lot near town. The proposed structure has room to house the object of most controversy. Therefore we would like to ask you a few brief questions."

Respondents were then asked if they were familiar with the issue. The one who responded was [illegible] and [illegible]. The only two areas in the municipality in which a high proportion of the [illegible] were [illegible] and [illegible]. [illegible] the [illegible] [illegible] [illegible]

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ALONZO W. LAWRENCE
and JAMES SIMPSON,

Plaintiffs-Respondents,

v.

BAUER PUBLISHING & PRINTING
LTD., a corporation, Kurt
Christopher Bauer, Jeffrey
Lance Bauer and Patsy
Bontempo,

Defendants-Appellants.

Argued Oct. 15, 1980.

Decided Nov. 14, 1980.

J. Roger Conant, Elizabeth, for defendants-appellants (Conant & McCreedy, Elizabeth, attorneys).

Paul R. Williams, Jr., Westfield, for plaintiffs-respondents (Williams & Flynn, Westfield, attorneys; Harry Green, of counsel; Paul R. Williams, Jr., on the brief.

Before Judges FRITZ, POLOW and JOELSON.

The opinion of the court was delivered by POLOW, J. A. D.

Plaintiffs Lawrence and Simpson sought damages for libel against the corporate owner, the editor, the publisher and a reporter of the RAHWAY-NEWS RECORD. When all of the evidence has been presented the trial judge granted a defense motion to dismiss Lawrence's claims based upon a determination that he was a "public figure." Thereafter, the jury returned a verdict of $22,500 in favor of Simpson against all defendants except the reporter.[1] On Lawrence's subsequent motion the dismissal of his complaint was set aside by the trial judge and a new trial

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1. Summary judgment was previously upheld in favor of another defendant, Joseph Hartnett, because the action against him was barred by the statute of limiations. Lawrence v. Bauer Publishing & Printing Ltd., 78 N.J. 371, 396 A.2d 569 (1979).

ordered thereon. Defendant's motion for a new trial with respect to the verdict for plaintiff Simpson was denied.

On appeal defendants demand that the verdict and judgment in favor of Simpson be reversed, that the new trial ordered for Lawrence be set aside and that all claims by both plaintiffs be dismissed.

Lawrence amd Simpson were charter members of the Rahway Taxpayers Association. Lawrence had served as president since its inception in 1965 and in that capacity expressed opinions publicly on numerous issues of concern to local taxpayers. He regularly attended city council and other local agency meetings and frequently acted as spokesman for the Association. Pursuant to his request, he received notice of special meetings.

Simpson was also an officer of the Association in 1974 and 1975 when the allegedly libelous articles were published and the

activities which provoked them took place. He also attended most of the city council meetings and periodically spoke on public issues. Over the years he has written letters to the editor of local newspapers on a variety of subjects.

In 1974, Lawrence, as Association president, led a petition campaign seeking to defeat a proposed $100,000 increase in local appropriations to finance a new firehouse. Both Lawrence and Simpson and a number of other volunteers actively collected signatures in an attempt to satisfy the statutory prerequisite for a referendum on the issue.

In late December 1974 plaintiffs submitted their petitions to the city clerk. On January 3, 1975 the city clerk advised plaintiffs by letter that the petitions were invalid. On January 9, 1975 the first of the offensive articles appeared on the front page of the defendants' weekly newspaper.

The two-line headline, in bold type, stretching across the entire front page announced:

City attorney rules association petitions improper: forgery charges may loom for Lawrence, Simpson

The newspaper article further particularized the charges against Lawrence and Simpson in the following first four paragraphs:

> In separate actions city attorney Karcher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Romankow was asked to take action by city officials against association leaders because of "irregularities" in the petitions.
>
> The Rahway News-Record learned Mr. Romankow was empowered to handle a case against Alonzo W. Lawrence, president of the association, and James

Simpson, the group's secretary-treasurer.

The City's case would be based on charges that forgery was involved in the gathering of approximately 5,000 signatures which the two men filed with the city clerk Robert W. Schrof on December 27, The News-Record was told.

In connection with this the men would also be charged with false swearing of oaths and affidavits, it was asserted.

Because of their concern about the effect of such an attach on their personal integrity, plaintiffs consulted counsel. Shortly thereafter a written demand for retraction was submitted, in response to which another article was published by defendants on April 17, 1975. It is also attacked as defamatory in plaintiffs' libel action. The headline proclaimed: "News-Record asked to retract article on firehouse battle." After

noting the demand for retraction, the story repeated the January 9 assertion that the newspaper had been told "by a source in the administration" that the petitions had been turned over to the local prosecutor for investigation of allegations of forgery and false swearing. This time the story emphasized that the paper has been "careful to note it was told or it learned or it was asserted." However, it continued to insist that the staff reporter "accurately interpreted what was told him ..." The newspaper also asserted that its comments were based on statements made by others and that it did not, in fact, accuse the men of guilt of the allegations which were under investigation by the local prosecutor.

Although the possibility of "forgeries" was a concern of the municipal officials, in fact, testimony of witnesses called by defendants compels the conclusion that plaintiffs were never accused by any municipal

or other official of having committed forgery or false swearing.

During the trial plaintiffs produced witnesses who testified that the articles cast doubt on the characters and reputations of Simpson and Lawrence and that, in the opinion of those witnesses, the newspaper stories meant that plaintiffs had committed forgery.

The January 9 article was written by defendant Patsy Bontempo who, at trial, identified as his primary sources of information, municipal prosecutor Theodore J. Romankow and city business administrator Joseph Hartnett. Hartnett was knowledgeable about goings-on in the city and had been a routine source of information for the reporter. According to Bontempo, Hartnett had advised him by telephone that plaintiffs were under investigation by the county prosecutor for forgeries of signatures on the petitions. The testimony of Romankow and

Harnett, witnesses called by defendants, clearly demonstrates that the reporter misinterpreted their comments.

Defendant Kurt Bauer, who provided background information for the January 9 story, holds 99% of the stock of the corporation which owns the newspaper. He was personally familiar with plaintiffs from their appearances at council meetings and also was aware of the sources of information for the article in question. He had personal knowledge of the issue and people involved. He testified that Hartnett had told him that the petitions were under investigation for forgery and false swearing, but he could not specifically recall whether Lawrence and Simpson were personally identified as targets of the investigation.

Upon receiving the demand for retraction, Bauer discussed the matter with Hartnett again and submitted a draft of the April 17 article to the city prosecutor

for written comment. The prosecutor responded that he had been requested to investigate allegations of forgery and false swearing in the petitions circulated by the Rahway Taxpayers Association "whose leaders included Alonzo W. Lawrence and James Simpson." Thereupon, Bauer published his April 17 article which proclaimed that the information contained in the January 9 story had been accurately reported.

The city prosecutor testified that he did not intend his letter to suggest that plaintiffs were under investigation. City business administrator Hartnett testified that although he believed there were irregularities in the gathering of signatures on the petitions, nevertheless, he never told anyone associated with the newspaper that plaintiffs themselves committed or were under investigation for committing any crime. Specifically, Hartnett denied telling Bauer or Bontempo that plaitniffs individually were

under investigation. Furthermore, according to Hartnett, when he was shown Bauer's proposed story draft prior to the April 17 publication, he informed Bauer that he had not suggested that there were charges against plaintiffs themselves.

After the testimony had been completed defendants renewed applications for dismissal of the complaints. Based upon all of the evidence, the trial judge concluded that Lawrence, as the Association's leader, was a "public figure" and dismissed his complaint as against all defendants. On the other hand, Simpson was determined not to have been a "public figure" and the motion to dismiss his complaint was denied. The jury returned a final verdict in Simpson's favor in the sum of $22,500 against the corporate owner, the publisher and the editor. The jury found no cause of action as against defendant Bontempo, the reporter who had written the original story.

Upon subsequent applications by both sides, the judge reiterated his determination of Lawrence's status as a "public figure." However, the dismissal was vacated and a new trial ordered to allow a determination by the jury of whether the offensive statements were made against Lawrence, as a public figure, with knowledge of their falsity or with reckless disregard for the truth. Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). On appeal defendants seek reversal of the judgment in favor of Simpson and dismissal of all demands made by both plaintiffs.

[1] Prior to trial, affirmative defenses based on truth were rejected since defendants were unable to provide proof that plaintiffs were actually guilty of the crimes of forgery and false swearing. Hence, defense counsel was directed not to argue in his opening statement that literal truth of the articles' contents constitutes a complete

defense although he was permitted to argue that the facts in the article were true. On appeal defendants continue to insist that the simple assertion that "forgery charges may loom for Lawrence [and] Simpson" was literally true. Thus, it is argued that the defense of truth is available. We reject this contention.

It is not significant that defendants used the qualified "charges may loom: rather than the unconditional "charges have been made" or "will be made." The capacity to destroy reputations is equally great. See Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 390 149 A.2d 193 (1959) (Weintraub, C. J. dissenting). The sting of an accusation may be more pervasive when made by insinuation. Insinuations may thus be more "mischievous" than direct assertions. Cross v. Guy Gannett Pub. Co., Inc. 151 Me. 491, 121 A.2d 355 (Sup.Ct. 1956).

[2] Nor may defendants shield themselves

from liability by literally relying on other soucrces. Rogers v. Courier Post Co., 2 N.J. 393, 401, 66 A.2d 869 (1949). In Rogers the libelous comment was contained in a quote from a third person attributing disreputable and degrading conduct to the injured party. The defense of truth and fair comment was rejected based upon the general rule that accurate repretition of libelous statements by others is not per se justifiable. Ibid.

[3] Surrounding the defamatory sting of their words with terms such as "reportedly," "may be," or "could possibly be" will not protect a publisher. Any other interpretation of the defense of "truth" would provide publishers with a cloak of immunity in the publication of rumor, gossip and malicious insinutations without responsibility for the consequent damages inflicted by the mere repretition in headlines of undocumented accusations.

[4-6] We are, therefore, entirely satisfied that a publisher of a statement which is defamatory by suggestion or insinuation, must, in order to present an adequate defense, prove more than that the article was literally true. That the information was received from another source is not enough. To sufficiently develop the defense of truth under the facts of this case, defendants must show that plaintiffs had in fact committed the offenses or that they had been formally charged with criminal conduct or that policy or county prosecuting authorities had announced an official investigation of plaintiffs for the offenses described in the articles.[2] See Rogers v. Courier Post Co., supra, 2 N.J. at 399, 66 A.2d 869.

2.

N.J.S.A. 2A:43-1 extends the privilege which attaches to publication of judicial proceedings to statements issued by police department heads and county prosecutors concerning investigations in progress or completed by them. If a publisher quotes or relies on other sources, he does so at his own peril.

[7] The trial judge imposed the more stringent requirement upon defendants that in order to avail themselves of the defense of truth, they must prove actual guilt of forgery or false swearing. Nevertheless, in this case the defense of truth was not available even under the less demanding test described above. The trial judge correctly determined that the defense of truth requires more than just a showing that the offensive statements were an accurate repetition of words spoken by a third person and that the "defamatory sting" rather than the literal meaning of the words must be proven true. Therefore, we find that the judge's action in striking the defense of truth was not inappropriate. See Rogers v. Courier Post Co., supra at 401, 66 A.2d 869.

[8,9] The trial judge ruled, as a matter of law, that the April 17, 1975 article was not a retraction. We agree. A retraction can only be effected if it is

full and unequivocal and free of insinuations and "hesitant withdrawals." Brogan v. Passaic Daily News, 22 N.J. 139, 147, 123 A.2d 473 (1956). It must be a sincere effort to repair all the wrong done by the defamatory article. Ibid. The April 17, 1975 article contains no effort to repair the harm done by the defamatory insinuations and, in fact, repeats those insinuations by reference to the previous article.

[10] Defendants were properly foreclosed from reliance on the "defense of fair comment" since the defense of "truth" was not available. The very reasons justifying rejection of the "truth" defense require denial of "fair comment" as a substitute therefor.

> In a word, "fair comment" (a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticized, save in so far as such imputations are

warranted by the facts, and (c) must be the honest expression of the writer's real opinion; and if the comment complies with these conditions, it is fair comment, ... [Leers v. Green, 24 N.J. 239, 254-255, 131 A.2d 781 (1957)]

Moreover, fair comment, "'cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact' ..." Id. at 255, 131 A.2d 781 See Dressler v. Mayer, 22 N.J.Super. 129, 134, 91 A.2d 650 (App. Div.1952). Hence, defendants went beyond the sphere of fair comment. Their insinuations were not based upon the facts as they knew or should have known them.

[11] Defendants also contend that it was error for the judge to instruct the jury that both articles were libelous as a matter of law. They point to some authority holding statements actionable per se and some holding to the contrary,

and conclude that an article is not libelous per se unless it suggests that the subject may be "guilty of" rather than merely "charged with" a crime. We disagree.

A writing is defamatory as a matter of law when the words sued upon suggest the commission of a crime. Dijkstra v. Westerink, 168 N.J.Super. 128, 133, 401 A.2d 1118 (App.Div.1979), certif. den. 81 N.J. 329, 407 A.2d 1203 (1979). Cf. Herrmann v. Newark Morning Ledger Co., 48 N.J.Super, 420, 430, 138 A.2d 61 (App.Div.1958). In Garven v. Finch, 97 N.J.L. 329, 116 A.2d 771 (E. & A. 1922), the following allegedly defamatory article appeared in a newspaper:

> "'I refer to [the plaintiff] having accepted in 1918 $5,000 of Public Service money which was the Hudson county allotment of the Public Service's contribution to Edge's senatorial campaign fund.'" [at 329, 116 A.2d 771]

The court held the offending language libelous per se. It was reasoned that whenever words sound to the disreputation of the

plaintiff, "they are defamatory on their face and actionable per se." Id. at 331, 116 A.2d 771.

In Hermann v. Newark Morning Ledger Co., supra, the following language was used:

> "LABOR EDITOR FACES QUIZ
> BY UNION
>
> It's all being kept very hush-hush, but according to very reliable sources Lewis M. Hermann, labor paper editor, will be called on the carpet at a special meeting of ITU Local 103 here this week to explain how he obtained the credentials he presented as a delegate at the State Federation of Labor convention in Atlantic City last week.
>
> While the same observers regard the move with some skepticism because of the long record in local labor circles of the new 103 president's Richard Ryan, Jr., as a super-progressive, they insist it is designed to add to the embarrassment Hermann already feels as a result of a speech at the covention." [48 N.J.Super. at 426, 138 A.2d 61]

Though the article did not accuse plaintiff of illegality, it was held libelous per se because it cast doubt on plaintiff's reputation in the business community.

Herrmann v. Newark Morning Ledger Co., supra at 430-431, 138 A.2d 61. Construing the article "according to the fair and natural meaning which will be given" to it by people of ordinary intelligence, Dressler v. Mayer, supra, 22 N.J.Super. at 135, 91 A.2d 650, the article was held to subject plaintiff "to a loss of the good will and confidence entertained towards him by others' ..." Herrmann v. Newark Morning Ledger Co., supra, 48 N.J.Super. at 431, 138 A.2d 61. See, also, Cross v. Guy Gannett Pub. Co., supra; Lancour v. Herald & Globe Ass'n, 111 Vt. 371, 17 A.2d 253 (Sup.Ct.1941); Crane v. New York World Telegram Corp., 308 N.Y. 470, 126 N.E.2d 753 (Ct.App.1955). Accord, Lamberg v. Providence Journal Co., 508 F.2d 656 (1 Cir. 1975), cert. den. 423 U.S. 828, 96 S.Ct. 45, 46 L.Ed.2d 45 (1975); Dressler v. Mayer, supra; Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5 Cir. 1968), cert. den. 393 U.S. 825, 89 S.Ct. 88, 21 L.Ed.2d 96 (1968).

[12-14] It is for the judge to decide in the first instance whether a writing when read and construed could be defamatory. Leers v. Green, supra, 24 N.J. at 255, 131 A. 2d 781. In those instances in which a publication is not reasonably susceptible of a nondefamatory meaning, the judge should rule the publication defamatory per se. Washington Post Co. v. Chaloner, 250 U.S. 290, 293, 39 S.Ct. 448, 63 L.Ed. 987 (1919); Belli v. Orlando Daily Newspapers, Inc., supra, 389 F.2d at 583; Herrmann v. Newark Morning Ledger Co., supra, 48 N.J.Super, at 430, 138, A.2d 61. We are satisfied that the ruling of the trial judge in this case, that the publications are libelous per se, is fully justified by the facts and that, within the context of the circumstances of their publication, he properly found that they were not susceptible of a nondefamatory meaning. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-4, 323 A.2d 495 (1974).

We turn next to the determination of "public figure" status with regard to each plaintiff as resolved by the trial judge. Whether or not a person is a "public figure" in a defamation action is of considerable significance since the degree of responsibility of defendants is substantially affected by that assessment.

[15] The constitutional guarantee of a free press, uninhibited by threat of suit, requires that "public officials" be limited in their right to recover damages for defamation to those instances where the defamatory statement was published with "malice"--that is with knowledge that the comment was false or in reckless disregard of whether or not it was false. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725, 11 L.Ed.2d 686 (1964). This was extended from "public officials" to "public figures" in Curtis Publishing Co. v. Butts, 288 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

[16, 17] In Gertz the Supreme Court held that a private plaintiff in a defamation lawsuit did not have to meet the strict New York Times standard to recover damages. 418 U.S. at 347, 94 S.Ct. at 3010. Where liability without fault is not imposed, the states are free to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Ibid. (footnote omitted).

The responsibility to resolve the status of a person in terms of private individual or public figure, and thus subject to the New York Times test, is an arduous task requiring application of an elusive concept. It has been described as "trying to nail jellyfish to the wall." Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 443, (S.D. Ga.1976), aff'd 580 F.2d 859 (5 Cir. 1978). The United States Supreme Court in Gertz v. Welch, supra, has defined public figures

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are propely classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. [418 U.S. at 342, 94 S.Ct. at 3008]

. . . . .

For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public contro-

versies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. [at 345, 94 S.Ct. at 3009]

. . . . .

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. [at 351, 94 S.Ct. at 3012]

Other jurisdictions have held that it is for the trial judge to determine whether the proofs reveal the plaintiff to be a "public official," Rosenblatt v. Baer, 383 U.S. 75,

88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966), or a "public figure." Hoffman v. Washington Post Co., 433 F.Supp. 600 (D.D.C.1977), aff'd 578 F.2d 442 (D.C.Cir.1978); Hotchner v. Castillo-Puche, 404 F.Supp. 1041, 1045 (S.D. N.Y.1957), rev'd on other grounds 551 F.2d 910 (2 Cir. 1977). This rule lessens the possibility that a jury will use the cloak of "public figure" or "public official" to punish unpopular ideas or speakers and will assure an appellate court of the record and findings required for appellate review. Rosenblatt v. Baer, supra, 383 U.S. at 88 n.15, 86 S.Ct. at 677 n.15. Cf. New York Times Co. v. Sullivan, supra, 376 U.S. at 285, 84 S.Ct. at 728.

[18] No reported New Jersey decision has specifically adopted the Rosenblatt rule imposing the duty to resolve the issue on the trial judge. We agree with the trial judge here, however, that some guidance may be found in our ruling in Barbetta

Agency, Inc. v. Evening News Pub. Co., Inc., 135 N.J.Super. 214, 218, 343 A.2d 105 (App.Div.1975), wherein we determined that the issue of privilege is one of law to be resolved by the judge. We conclude that whether a plaintiff in a defamation suit is a public figure is also one for the judge. Similarly, although application of the statute of limitations involves questions of fact, particularly where the problem of "discovery" is involved, nevertheless, our Supreme Court has imposed the responsibility to determine applicability thereof upon the trial judge. Lopez v. Swyer, 62 N.J. 267, 274-275, 300 A.2d 563 (1973). Submission of such issues to a jury is awkward and may lead to confusion. As here, "[t]he decision requires more than a simple factual determination ...." Id. at 275, 300 A2d 563. Hence, "it should be made by a judge ... conscious of the equitable nature of the issue ...." Ibid.

[19-21] Our task in reviewing the trial court's detemrination is not to weigh the evidence anew but rather to determine whether there was sufficient credible evidence in the record to support those determinations. State v. Johnson, 42 N.J. 146, 164, 199 A.2d 809 (1964). With respect to the rulings finally made on the status of each plaintiff, we conclude that there was adequate, credible evidence to support those findings. In the case of Simpson, the record adequately supports the ruling that he did not attain the degree of public recognition, notoriety or attention to be declared a public figure. In the case of Lawrence, there is sufficient evidence to support the determination that, based upon his activities as the leader of the petition campaign and association president, he was a public figure and thus must meet the more stringent proof requirement upon retrial. Since the issues involved in Lawrence's claims

must be dealt with in the context of his status as a public figure, to succeed he will be required to show that defendants were aware that they were circulating false information, New York Times Co. v. Sullivan, supra, 376 U.S. at 285-286, 84 S.Ct. at 728, or that the false publication was made with a "high degree of awareness of ... probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964); Curtis Publishing Co. v. Butts, supra, 388 U.S. at 153, 87 S.Ct. at 1990.

[22, 23] With regard to the verdict in favor of Simpson in the sum of $22,500, we are satisfied that the remaining assertions of error lack merit. We discern no impropriety in permitting the use of Bauer's deposition to show that he was reluctant to disclose the source of his information for the defamatory articles. Bauer was a party to the litigation and an officer of the defendant corporation which owned the

newspaper. His deposition could therefore be used by the adverset party for any purpose against him or against the corporation, R.4:16-1(b), or it could be used against him as a witness, for impeachment purchases. R.4:16-1(a). Nor do we find any merit in defendants attack on the charge with regard to damages. Reading the charge as a whole, we find no implication that the jury may presume damages. Allegedly objectionable portions may not be taken out of context and read in isolation. The charge must be read and considered in its entirety to determine its validity. State v. Wilbely, 63 N.J. 420, 422, 307 A.2d 608 (1973); State v. Council, 49 N.J. 341, 342, 230 A.2d 383 (1967). Considering the charge as a whole, we find it unexceptionable.

For the reasons stated, the judgment in favor of plaintiff Simpson is affirmed. We also affirm the trial court's determination

that Lawrence is a public figure and the order for a new trial of his claims.

Ruling of Judge Bryant W. Griffin, J.S.C. on October 18, 1979 on determination that Lawrence was a public figure and that James Simpson was a private figure.

Now, having reviewed the tests, I have no difficulty in determining that Mr. Lawrence is a public figure. He was the leader in this controversy. He was mentioned in at least twenty-one newspaper articles over a relatively short period of time in connection with this controversy. In many of these articles, his name was in the headlines. Therefore nothing suggest in this case nor do I think, even though there is no suggestion of boot strapping. This newspaper was not setting Mr. Lawrence up for the kill. He was -- it was not putting his name in the paper over a six month period on this controversy for the purpose of making him a public

figure to come out and slander him later. So I don't think a boot strapping concept which is suggested in one of the cases has any application here at all.

He gave news releases, at least one, and I believe there's testimony of more than one, to the paper. His own witness referred to him as a historical landmark in the community. Really, he was in the public eye on this issue. As we all know, he was one of the circulators of the petitions. He was on the committee. I don't think these items are materially important. Certainly individually they are not, but the accumulative effect and the real publicity that he got impresses this Court a great deal.

He went to public meetings. He spoke at public meetings and he got publicity for speaking at public meetings. So the Court will hold that Mr.

Lawrence is a public figure as opposed to a private figure for the purposes of this litigation.

The Court reaches a contrary conclusion as to Mr. Simpson. Prior to the January 9th issue which contained the defamatory statement, he had written three letters to the editor and one of them was on the subject of garbage disposal and there had been one reply. Now, I certainly feel that that alone, writing an occasional letter to the editor, does not make a public figure of a person in this sense. And I have completely discounted the Allan Tabloid article which occurred on May 30th, 1979 some four years subsequent to the issue involved here. It certainly has no bearing whatsoever on whether or not he was a public figure at the time the libel was made and that's the test. He might be a public figure today. I don't know

and I don't care. But that article has no bearing on what his status was at that time. The Court found only one newspaper article mentioning Mr. Simpson and that article had his picture in it.

Now I think during the course of the trial there was some suggestion that he was mentioned in some other article. I scanned every single article and didn't pick it up, but even if he were mentioned in the middle of some other article, I don't think that that is enough to tip the scales on the subject. Certainly the Court feels that a person should not be subject to this higher standard because he goes to council meetings and sometimes speaks out or because he circulates a petition along with many other people, five thousand names, many people were circulating these petitions, nor the fact that he was one of the statutorially required committee on

petitions which really requires no action at all.

One of the most important tests is access to the media and he did not have the access to the media at all in the sense that Mr. Lawrence did. Now maybe we can argue or it may be argued that because he is in this case with Mr. Lawrence and Mr. Lawrence's position as a public figure is so strong, that that tends to subvert the Court's reasoning to affect the Court's reasoning in holding that Mr. Simpson is not a public figure. I've attempted to look at this as though Mr. Simpson were the only plaintiff in the case and I do not feel that he meets the test.

Now in the Times case, Times vs. Firestone, has he voluntarily exposed himself to increased risk of injury from defamatory falsehood? He was not in the vortex of this fight. He did not

get the newspaper publicity. He acted more or less as a private citizen in attending meetings, making an occasional dispute. There's a dispute in the number of speeches he made. He talked frequently, but he talked occasionally at least and I do not think he meets the standards. So the Court will hold that Mr. Simpson for the purposes of this litigation, is not a public figure.

News-Record asked to retract article on firehouse battle

The Rahway News-Record was asked to retract statements made in the January 9 edition concerning the article headlined "Lawrence warns mayor on libel" "City attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson."

The News-Record was told prior to publication of the January 9 edition by a source in the administration that city officials were turning the petitions over to the local prosecutor, which in fact they did, to investigate allegations of forgery and false swearing of oaths.

It should be clearly stated that in each case where the charges were made, The News - Record was careful to note it "was told," it "learned" or "it was asserted."

Never did The News-Record state these men have bad reputations, nor does it now, nor have any facts been brought to the attention of the newspaper to confirm the allegations.

The News-Record staff reporter accurately interpreted what was told to him and did in fact on many occasions throughout the petitions controversy concerning the additional firehouse appropriation speak to members of the opposing parties involved to gain their opinions.

In no instance, as it is very clear from a reading of the article, does the newspaper state the gentlemen Alonzo W. Lawrence and Nathan Simpson were guilty of any of the allegations in fact being investigated by the local prosecutor.

The fact of the matter is that the Rahway Taxpayers Association, of which Messrs. Lawrence and Simpson are officers, announced in a paid newspaper advertisement that it was "spearheading" a petition drive seeking to bar added appropriations for the new firehouse.

Those two men were later pictured in The News-Record personally handing stacks of petitions to city clerk Robert W. Schrof.

Subsequently the same petitions were in fact turned over to local prosecutor Theodore Romankow to investigate allegations of forgery and false swearing of oaths.

As part of the prosecutor's investigation a detective was assigned to the case and he did in fact interview Mr. Lawrence. After the local investigation Mr. Romankow did in fact turn the petitions over to the Union County prosecutor's office for further investigations of the charges.

The News-Record did not and does not seek to harm Messrs. Lawrence and Simpson or to in anyway injure their good names. The pair of their own choosing publicly associated themselves and their organization with the petitions.

The gentlemen, thus, are in fact associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths.

This did not and does not mean, nor was it ever said to mean, the gentlemen are guilty of anything.

NO. 82-130

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALONZO W. LAWRENCE and JAMES SIMPSON,

Petitioners,

vs.

BAUER PUBLISHING & PRINTING LTD., a corporation, KURT CHRISTOPHER BAUER, JEFFREY LANCE BAUER and PATSY BONTEMPO,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Statement

Plaintiffs, Alonzo W. Lawrence and James Simpson brought this action for libel against defendants, Bauer Publishing and Printing, Ltd., a corporation, Kurt Christopher Bauer (editor and publisher), Jeffrey Lance Bauer (minor-

ity stockholder), Patsy Bontempo (reporter) and "John Doe" (fictional). The action is founded upon articles which appeared in the Rahway News Record on January 9, 1975 and April 17, 1975 (Pa67 and 106). The matter was tried with a jury on October 11, 15 and 16, 1979, in the Superior Court of New Jersey, Law Division, Union County. At the conclusion of the presentation of evidence, the trial judge ruled the plaintiff Alonzo Lawrence to have been a public figure. There being no evidence of actual malice, the court also granted a judgment of dismissal with respect to the claims of Lawrence. The Simpson case went to the jury, ultimately resulting in a verdict of $22,500.

Post-trial motions were made by both parties. The trial judge reversed himself with respect to the Lawrence case and granted a new trial. Defendants' motions attacking the Simpson verdict were denied.

Defendants' motion for leave to file an interlocutory appeal with respect to both cases, was granted by the Superior Court, Appellate Division, but the Appellate Division affirmed the trial court in all respects, 176 N.J. Super. 378 (App. Div. 1981). A motion by defendants for leave to appeal was granted by the Supreme Court of New Jersey. That court ruled, *inter alia*, that both Lawrence and Simpson were public figures as a matter of law. The Court also found there was insufficient evidence of actual malice by defendants, and directed that a judgment be entered in favor of defendants with respect to both plaintiffs.

Plaintiffs now petition this Court for a Writ of Certiorari citing abridgement of the freedom of speech and denial of due process as the constitutional basis for the Court's jurisdiction.

The issues raised by plaintiffs concern the Supreme Court of New Jersey's determination that the plaintiffs were public figures and the absence of actual malice by defendants.

The Facts

The underlying episode which gave rise to the alleged libel in this case was a dispute over whether the City of Rahway, New Jersey was in need of a new fire house. The plaintiffs, Lawrence as President and Simpson as Vice-President of the Rahway Taxpayer's Association mounted a concerted effort to arouse public opinion against the construction of the fire house. In order to have the matter placed on a public referendum, plaintiffs led the drive for a petition to that effect. The Taxpayer's Association collected approximately 5,000 signatures. The defendant newspaper received information from a usually reliable source that an investigation was being conducted into certain suspected "irregularities" among the signatures. The source, Joseph Hartnett, was the business administrator for the City of Rahway.[1] He testified that his review of the petitions revealed many signatures to appear to be in the same handwriting, including petitions attested to be Lawrence and Simpson.

As a result of discussions with the Mayor, the petitions were referred to the Municipal Prosecutor for investigation. After the Municipal Prosecutor reported back to Mr. Hartnett and the Mayor, it was agreed to have the County Prosecutor look into the matter.

Mr. Hartnett advised the defendant newspapers when the matter was referred to the Municipal Prosecutor, speaking with the defendant Kurt Bauer (publisher and editor) and the defendant Patsy Bontempo (reporter). Within few days of this conversation, the January 9, 1975 article

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[1] Mr. Hartnett was added as a defendant by an amended complaint, but the claim was held to be barred by a one year Statute of Limitations in an earlier Appeal. 78 N.J. 371 (1979), reversing 154 N.J. Super. 271 (App. Div. 1977).

appeared (Pa67). The article mentioned the investigation which was to take place and further stated that false swearing or forgery charges could result from the investigation. Hartnett testified that he told defendants ". . . the city administration is alleging that there are forgeries and false swearing of oaths in connection with these petitions . . ."

After publication of the January 9, 1975 article, Lawrence and Simpson demanded a retraction. Before making further comment, defendant Kurt Bauer spoke again to Mr. Hartnett who confirmed the truthfulness of his earlier statement. He also spoke to the Municipal Prosecutor who confirmed that he had conducted an investigation and referred the matter to the County Prosecutor.

On April 17, 1975, the defendant paper published an additional article (Pa 106), wherein it noted the demand for a retraction, restated the information it had been given, and took pains to emphasize that there was no contention that the plaintiffs were *guilty* of any wrong doing. The article said,

> The News-Record did not and does not seek to harm Messrs. Lawrence and Simpson or to in anyway injure their good names. The pair of their own choosing publicly associated themselves and their organization with the petitions

Both Lawrence and Simpson were generally active in public affairs in Rahway, and at the forefront of the opposition to the fire house in that controversy. The evidence showed they regularly attended meetings of the City Council. Lawrence had attended every meeting of the Council for years and was on a list of people to be notified for special meetings. He often expressed

opinions on matters of public interest both at Council meetings and in letters to the editors of different newspapers. As President of the Taxpayer's Association, he led the fight against construction of the fire house. Much of the information in the article of January 9, 1975, was based on a press release he had given to the dedefendant newspaper. He was a founder of the Taxyayer's Association and was its spokesman on many issues at public meetings.

Similarly, Mr. Simpson had been a member of the Taxpayer's Association from its inception. He was its Vice-President at the time of this controversy, and served for years as its Treasurer. He attended Council meetings regularly and spoke at them. He also wrote letters to the editors of newspapers for publication. He also wrote press releases for the media on various issues. Mr. Simpson recalled that he had collected 10 or 11 sheets of signatures with 25 names on each for the petition. Significantly, Simpson had telephoned the defendant newspaper on the day the petitions were to be turned over to the city clerk requesting a photographer be present to record the turning over of the petitions. This was done and the photograph appeared on the front page of the newspaper.

Both Lawrence and Simpson were individual plaintiffs in a law suit brought against the City of Rahway regarding the firehouse.

ARGUMENT

POINT I

The Supreme Court of New Jersey adhered strictly to standards set by the United States Supreme Court in determining that both plaintiffs were public figures, and a writ of certiorari should not issue.

The determination of whether plaintiffs were "public figures" for purposes of the law of defamation must be made under the standards of *Gertz* v. *Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 61 L. Ed. 2d 411 (1974). The New Jersey Supreme Court found that plaintiffs were not "public figures for all purposes" *Lawrence* v. *Bauer Pubilshing and Printing Ltd.*, 89 N.J. 451, at 463 (1982). That is, they did not ". . . achieve such pervasive fame or notoriety that . . . [they became] . . . public figure[s] for all purposes and in all contexts." *Gertz*, however, confers public figure status on one who

> . . . voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

It was against this standard that the New Jersey Supreme Court determined both plaintiffs to have been public figures.

Indeed, it is difficult to imagine that these plaintiffs could be found anything but public figures, as they so clearly, prominently, and voluntarily did inject themselves into the vortex of a public issue. The New Jersey Supreme Court carefully catalogued the evidence that both plaintiffs had done so, 89 N.J. at 463 to 465. While plaintiff Simpson's involvement was not quite so prominent as that of plain-

tiff Lawrence, the Court properly found that his role was not to be measured against that of Lawrence, but in the context of his involvement in the matter as a whole. Simpson's desire to be in the forefront of the public issue is highlighted by the evidence that he telephoned the defendant newspaper to request that they have a photographer present to photograph him and others turning over the petitions for filing.

Plaintiffs' petition concedes that the plaintiffs are to be judged as those who voluntarily placed themselves in the public eye. Their argument recognizes their position as distinct from those who unwillingly achieve prominence because of publicity surrounding a particular issue. See e.g., *Wolfston* v. *Reader's Digest Ass'n Inc.*, 433 U.S. 157, 61 L. Ed. 2d 450 (1979) and *Hutchinson* v. *Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979). Plaintiffs argue that their case affords the Court an opportunity to pronounce more explicit guidelines for the determination of public figure status for those who voluntarily inject themselves into a controversy.

However, as pointed out by the New Jersey Supreme Court,

> *Gertz* refrains from establishing specific criteria against which a plaintiff's status can be measured to determine whether or not he is a public figure. Rather in instances where the plaintiff is not a public figure for all purposes, *Gertz* calls for a case-by-case examination looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation, 418 U.S. at 352, 41 L. Ed. 2d at 812 (89 N.J. at 463).

In deciding that plaintiffs were public figures as a matter of law, the New Jersey Supreme Court properly

exercised the function of evaluating the plaintiff's involvement in the criteria. There is no conflict between *Gerts* and the decision of the New Jersey Supreme Court in this case. Defendants respectfully urge that plaintiff's petition for a writ of certiorari should be denied.

POINT II

The Supreme Court of New Jersey properly determined that the evidence could not give rise to a finding of actual malice on the part of defendant, and a writ for certiorari should not issue.

Petitioners also seek certiorari on the grounds that the New Jersey Supreme Court erred in finding the evidence insufficient to establish actual malice by defendants in publication of the alleged libel.

A finding that plaintiffs were public figures would bar their recovery unless they could show

> . . . on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Gerts v. *Welch*, 418 U.S. 323 to 343, 94 S. Ct. 2997 at 3008, 41 L. Ed. 789 (1974). The New Jersey Supreme Court concluded that the evidence did not establish either knowledge of falsity or reckless disregard of truth as those phrases find meaning in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) and *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262 (1968).

Contrary to petitioners' assertion that the New Jersey Supreme Court failed to examine ". . . the evidence to see whether or not there is substantial evidence to send the

matter to the jury on the question of actual malice . . ." (pg. 51), the opinion states

> . . . we have carefully examined the record below to determine whether the evidence at trial was sufficient to present a jury question as to actual malice. The evidence reveals that there was insufficient evidence of actual malice toward either plaintiff (89 N.J. at 467)

Therefore, the Court did not assume the role of fact finder as petitioners contend, but exercised its traditional function of determining whether the evidence was sufficient for jury consideration as a matter of law.

The New Jersey Supreme Court correctly applied the standard set forth in *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L. Ed. 262 (1968) in evaluating the evidence of actual malice. As both *St. Amant* and the New Jersey Supreme Court point out, it is evidence of one's state of certainty in making utterances that has relevance. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra*, 390 U.S. 727 at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. To the contrary, defendants testified that they believed what was told them was true, and took pains to verify that it was. After publication of the first article, they again spoke to their source, Mr. Hartnett, and to the Municipal Prosecutor as well. There was no evidence that defendants' doubted or had reason to doubt the truth of the contents of their articles.

Conceding that defendants may have been "careless" or "irresponsible," (89 N.J. at 468) the New Jersey Supreme Court nonetheless concluded that ". . . defendants honestly believed that the concededly misleading state-

ments published in the two articles were true." 89 N.J. at 467. The Court thus found there was no evidence of doubt in the mind of defendants concerning the truth of what was printed. Given that, a finding of actual malice was not possible.

Petitioners urge certiorari should be granted to give the Supreme Court an opportunity to set further guidelines for the States with respect to the issues of "public figures" and "actual malice." A reading of *Gerts, supra,* indicates the Court has given thorough consideration to balancing the interests of individuals and the States. *Gerts* leaves with the States greater latitude in defining defamation liability to private individuals (94 S. Ct. at 3010) but emphatically defines the standards applicable to public figures. Recognizing that public figures may sometimes be left without redress, the Court concludes that such a result is necessary to guarantee freedom of the press, especially in view of the ". . . limited state interest present in the context of libel actions brought by public persons." 94 S. Ct. at 3008.

CONCLUSION

Based on the foregoing, Respondents urge that the petition for writ of certiorari be denied.

September 28, 1982

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